Ahmad Zaini bin Japar v TL Offshore Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S5-22-420- OF 2000
ABDUL MALIK ISHAK J
18 OCTOBER 2001

Companies & Corporations *— Directors — Authority — Admission by defendant's executive director — Whether executive director was authorized — Whether plaintiff entitled to assume that all matters of internal management had been complied with — Indoor management rule*

Contract *— Illegality — Defence of — Plaintiff agreed to procure contract for defendant in consideration for sum of money — Whether plaintiff had illegally influenced third party to award contract to defendant — Whether it was illegal for plaintiff to render services to secure contract for defendant*

The plaintiff was requested by the defendant to provide advisory services and assistance and to negotiate with several agencies for the purpose of procuring a contract for the defendant with Petronas Carigali. An oral agreement was reached between the plaintiff and the defendant wherein the defendant agreed to pay to the plaintiff, as consideration for securing the contract with Petronas Carigali, an amount equivalent to 1% of the contract value, subject to a limit of RM12m. The plaintiff rendered the advisory services and succeeded in securing for the defendant a contract bearing number PCSB 210021R valued at RM2.1 billion. The defendant paid RM700,000 to the plaintiff for the services rendered. The payment was made in two parts to two companies owned by the plaintiff. The plaintiff wrote to Tan Sri Halim Saad, who was a director of the defendant's majority shareholder, regarding the outstanding balance due to the plaintiff. Tan Sri Halim Saad did not personally respond to the plaintiff's letter but the defendant's executive director ('Syed Alwi') responded. In his letter of 5 September 1998, Syed Alwi mentioned the sum of RM700,000 that had been paid to the plaintiff's companies and further stated that 'as agreed earlier, we would endeavour to pay you for your marketing services in procuring for TL Offshore Sdn Bhd the contract PCSB 2100 21R, up to the sum of RM12m'. According to Syed Alwi's letter, the delay in paying the outstanding balance was only a temporary setback and Syed Alwi acknowledged that the plaintiff's services had enabled the defendant to successfully secure the Petronas contract. The plaintiff sued the defendant when the defendant failed to pay the outstanding sum and the plaintiff sought to enter summary judgment against the defendant pursuant to O 14 of the Rules of the High Court 1980 ('the RHC'). Meanwhile, the defendant applied to strike out the plaintiff's writ of summons and statement of claim under O 18 r 19 of the RHC. The deputy registrar allowed the plaintiff's application to enter summary judgment against the defendant and dismissed the defendant's application to strike out the plaintiff's writ and statement of claim. The defendant appealed against the deputy registrar's decisions. The defendant vehemently denied any knowledge

of Syed Alwi's letter and raised the issues concerning the real identity of the maker of the letter and that Syed Alwi had acted without the defendant's knowledge. No affidavit had been filed by Syed Alwi to support the defendant's contention. The defendant further argued that the plaintiff's activity was illegal as he, being a third party, was able to influence the private and internal machinery of a national oil company in the award of a multi-million ringgit contract irrespective of more competitive and deserving bidders.

Held, dismissing the defendant's appeal:

(1) To the plaintiff, Syed Alwi held the post of an executive director in the defendant's company and the plaintiff need not concern himself as to what were the powers that had actually been delegated to Syed Alwi. The plaintiff can safely assume that Syed Alwi had the usual powers of a person in the position of an executive director. Further, the plaintiff was entitled to assume, as he did, that all matters of internal management and procedures prescribed by the articles had been complied with. This was the 'indoor management rule' and this rule must be applied in favour of the plaintiff as the plaintiff was not put on notice in regard to the irregularity of the defendant's internal management (see pp 629F–G, 654A–B, 668I–669A).

(2) The plaintiff had kept to his promise by securing the Petronas contract for the defendant and the defendant must keep its promise to pay RM12m to the plaintiff for the services rendered. A sum of RM700,000 had been paid and the plaintiff was entitled in law and was also entitled by way of a summary judgment to the balance sum. There were no bona fide triable issues at all in the present case (see p 630B–C).

(3) By sending the letter of 5 September 1998, Syed Alwi was not acting ultra vires. Even if the transaction between the parties were ultra vires, which was not the case here, pursuant to s 20(1) of the Companies Act 1965, the transaction would still be valid and binding on the defendant (see p 632B–C).

(4) The statement of claim as it stood showed the existence of a valid and binding contract between the parties and the defendant's application to strike out the plaintiff's writ of summons together with the statement of claim under O 18 of the RHC was rightly dismissed by the deputy registrar. On the facts, the deputy registrar was also correct when she allowed the plaintiff's application for summary judgment under O 14 of the RHC. The defendant had failed to show a bona fide defence to the plaintiff's claim (see pp 636G–637I).

(5) In attempting to tie up the issue of illegality with the tender procedures adopted by Petronas Carigali, the defendant was saying that the plaintiff had illegally influenced Petronas Carigali to award the contract to the defendant. The defendant also

seemed to say that if Petronas Carigali were to strictly adhere to tender procedures, other more competitive and deserving bidders could secure the contract. There was nothing sinister or illegal in the plaintiff rendering his services to secure the contract for the defendant. The contract between the plaintiff and the defendant can never be construed as a contract that ran counter to Malaysian public policy (see pp 648G–H, 649B, 666F).

(6) The plaintiff had expended his exertions in securing the Petronas contract and he was successful in his endeavours. What the plaintiff did came within the ambit of s 2(d) of the Contracts Act 1950 in that the promisee had done something at the desire of the promisor and the act of the promisee can be construed as consideration for the promise. The plaintiff promised that he would assist in obtaining the Petronas contract and in return, the defendant promised to pay the plaintiff RM12m for the service. The exchange of mutual promises, although executory, was a good consideration under the law. Accordingly, there was a binding contract between the parties (see pp 667H–668B).

(7) On the facts, the defendant's appeal against the deputy registrar's decision in dismissing the defendant's application to strike out the writ and statement of claim must fail. It was undeniable that the defendant had benefited under the contract. This was confirmed by Syed Alwi's letter. The fact that Syed Alwi did not affirm an affidavit in support of the defendant must be construed adversely against the defendant. The facts revealed a cause of action against the defendant and the pleading was not frivolous and vexatious. No matter how weak the cause of action may be, the court should not simply strike out a statement of claim (see pp 660G–H, 662C, F, 664E).

[Bahasa Malaysia summary

Plaintif diminta defendan memberikan perkhidmatan nasihat dan bantuan dan berunding dengan beberapa agensi bagi tujuan mendapatkan kontrak Petronas Carigali untuk defendan. Satu perjanjian lisan dibuat di antara plaintif dan defendan dimana defendan bersetuju membayar plaintif, sebagai balasan mendapatkan kontrak Petronas Carigali, sejumlah bersamaan 1% nilai kontrak, tertakluk kepada had RM12j. Plaintif memberikan khidmatan nasihatnya dan berjaya mendapatkan kontrak PCSB 210021R bagi defendan yang bernilai RM2.1b. Defendan membayar RM700,000 kepada plaintif bagi perkhidmatannya. Bayaran ini dibuat dalam dua bahagian kepada dua syarikat yang dimiliki plaintif. Plaintif menulis kepada Tan Sri Halim Saad, seorang pengarah syarikat pemilik saham majoriti defendan, mengenai baki jumlah yang harus dibayar kepada plaintif. Tan Sri Halim Saad tidak secara peribadinya membalas surat plaintif tetapi pengarah eksekutif defendan ('Syed Alwi') membalas surat tersebut. Di dalam suratnya bertarikh 5 September 1998, Syed

A Alwi menyentuh jumlah RM700,000 yang telah dibayar kepada syarikat-syarikat plaintif dan selanjutnya berkata 'sepertimana yang telah dipersetujui, kami akan berusaha untuk membayar kamu bagi perkhidmatan pemasaran kamu dalam mendapatkan bagi TL Offshore Sdn Bhd kontrak PCSB 210021R yang berhad maksima RM12j'. Menurut Syed Alwi, kelewatan dalam membayar baki yang B perlu dibayar adalah hanya kelewatan sementara sahaja dan Syed Alwi mengakui perkhidmatan plaintif telah menjayakan defendan mendapatkan kontrak Petronas Carigali. Plaintif mengeluarkan saman ke atas defendan apabila defendan gagal untuk membayar baki jumlah yang perlu dibayar itu dan plaintif memohon penghakiman terus C dimasukkan terhadap defendan di bawah peruntukan A 14 Kaedah Mahkamah Tinggi 1980 ('KMT'). Sementara itu, defendan memohon untuk membatalkan writ saman dan pernyataan tuntutan plaintif di bawah A 18 k 19 KMT. Timbalan Pendaftar menolak permohonan defendan untuk membatalkan writ serta pernyataan tuntutan plaintif dan membenarkan permohonan plaintif untuk D memasuki penghakiman terus terhadap defendan. Defendan merayu ke atas keputusan timbalan pendaftar. Defendan telah menafikan secara tegasnya sebarang pengetahuan mengenai surat Syed Alwi serta membangkitkan isu mengenai identiti sebenar penulis surat tersebut dan Syed Alwi telah bertindak tanpa pengetahuan defendan. Tiada afidavit yang difail oleh Syed Alwi untuk menyokong dakwaan E defendan. Defendan juga menghujah bahawa aktiviti plaintif menyalahi undang-undang kerana, sebagai pihak ketiga, dia dapat mempengaruhi pengurusan peribadi dan dalaman satu syarikat minyak nasional dalam award kontrak yang berjumlah berjuta-juta ringgit tanpa mengira tawaran yang lebih kompetitif dan layak.

F

Diputuskan, menolak rayuan defendan:

(1) Bagi plaintif Syed Alwi memegang jawatan pengarah eksekutif dalam syarikat defendan dan plaintif tidak perlu untuk mengambil tahu apakah bidangkuasa sebenarnya yang telah diberikan kepada G Syed Alwi. Plaintif dapat mengandaikan bahawa Syed Alwi mempunyai bidangkuasa yang harus ada pada seorang pengarah eksekutif. Lagipun plaintif berhak untuk mengandaikan seperti yang berlaku di sini bahawa semua pengurusan serta prosedur dalaman yang dinyatakan dalam aritikel tersebut telah dipatuhi. Ini adalah 'peraturan pengurusan dalaman' dan peraturan ini H mestilah digunakan memihak plaintif kerana plaintif tidak diberitahu mengenai ketidakseragaman pengurusan dalaman defendan (lihat ms 629F–G, 654A–B, 668I–669A).

(2) Plaintif telah menunaikan janjinya dengan mendapatkan kontrak Petronas bagi defendan dan defendan mesti menunaikan I janjinya untuk membayar RM12juta kepada plaintif bagi perkhidmatannya itu. Jumlah wang RM700,000 telah dibayar dan plaintif berhak dari segi undang-undang dan juga berhak dari

segi penghakiman terus kepada baki wang selebihnya. Tidak terdapat sebarang isu bona fide yang boleh dibicarakan dalam kes ini (lihat ms 630B–C). A

(3) Dengan menghantar surat yang bertarikh 5 September 1998, Syed Alwi tidak bertindak secara ultra vires. Walaupun jika transaksi di antara kedua-dua belah pihak tersebut adalah ultra vires, yang tidak merupakan kes di sini, di bawah peruntukan s 20(1) Akta Syarikat 1965, transaksi ini adalah masih sah dan terikat terhadap defendan (lihat ms 632B–C). B

(4) Pernyataan tuntutan menunjukkan kewujudan satu kontrak terikat yang sah antara kedua-dua pihak dan permohonan defendan untuk membatalkan writ saman plaintif bersama dengan pernyataan tuntutannya di bawah A 18 KMT telah secara tepatnya ditolak oleh timbalan pendaftar. Secara kenyataannya adalah tepat bagi timbalan pendaftar untuk membenarkan permohonan plaintif bagi penghakiman terus di bawah A 14 KMT. Defendan gagal untuk menunjukkan pembelaan bona fide terhadap tuntutan plaintif (lihat ms 636G–637I). C D

(5) Dalam usaha untuk mengaitkan isu keharaman dengan prosedur tender yang digunakan oleh Petronas Carigali, defendan mengatakan bahawa plaintif secara tidak sah mempengaruhi Petronas Carigali untuk menawarkan kontrak kepada defendan. Defendan juga mengatakan jikalau Petronas Carigali dengan tegasnya mematuhi prosedur tender, tawaran yang lebih kompetitif dan layak mungkin mendapat kontrak tersebut. Tidak ada apa-apa yang sinis ataupun salah dengan plaintif menawarkan perkhimatannya untuk mendapatkan kontrak bagi defendan. Perjanjian antara plaintif dan defendan bukan satu kontrak yang menyalahi polisi awam Malaysia (lihat ms 648G–H, 649B, 666F). E F

(6) Plaintif telah menggunakan pengaruhya untuk mendapatkan kontrak Petronas dan dia berjaya dalam usahanya ini. Apa yang dilakukan oleh plaintif termasuk dalam peruntukan s 2(d) Akta Kontrak 1950 di mana penerima janji telah telah membuat sesuatu bagi hasrat penjanji dan tindakan penerima janji boleh dianggap sebagai balasan bagi janji tersebut. Plaintif berjanji akan membantu dalam mendapatkan kontrak Petronas dan sebagai balasan defendan telah berjanji untuk membayar plaintif RM12 juta bagi perkhidamatan tersebut. Penukaran perjanjian bersama ini, walaupun belum dilaksanakan merupakan satu balasan yang sah di bawah undang-undang. Oleh yang demikian, terdapat satu kontrak terikat di antara kedua-dua pihak (lihat ms 667H–668B). G H

(7) Berdasarkan kenyataan, rayuan defendan terhadap keputusan penolong pendaftar dalam menolak permohonan defendan untuk membatalkan writ dan pernyataan tuntutan mesti gagal. Tidak boleh dinafikan bahawa defendan telah beruntung di bawah kontrak tersebut. Ini disahkan oleh surat Syed Alwi. Kenyataan I

bahawa Syed Alwi tidak mengikrarkan afidavit sebagai sokongan kepada defendan mesti dipandang secara negatif defendan. Fakta-fakta menunjukkan satu kausa tindakan terhadap defendan dan pliding tersebut bukan remeh dan membebankan. Walaupun betapa lemahnya sesuatu kausa tindakan, mahkamah tidak seharusnya membatalkan sesuatu pernyataan tuntutan (lihat ms 660G–H, 662C, F, 664E).]

Notes

For cases on authority of directors, see 3 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 124–128.

For cases on defence of illegality, see 3 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 3104–3106.

Cases referred to

Abdul Rahim Abdul Hamid & Ors v Perdana Merchant Bankers Bhd & Ors [2000] 2 MLJ 417 (refd)

Ashbury Railway Carriage & Iron Co Ltd v Riche (1875) LR 7 HL 653 (refd)

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400 (refd)

Bargate v Shortridge (1855) 5 HL Cas 297 (refd)

Berg v Sadler & Moore [1937] 2 KB 158 (refd)

Bumiputra Merchant Bankers Bhd v Supreme-QBE Insurance Bhd [1990] 2 MLJ 247 (refd)

Butler Machine Tool Co Ltd v Ex-Cell-O Corp (England) Ltd [1979] 1 All ER 965 (refd)

Carlill v Carbolic Smoke Ball Co [1893] 1 QB 256 (refd)

County Life Assurance Co, Re (1870) 5 Ch App 288 (refd)

Currie v Misa (1875) LR 10 Ex 153 (refd)

Davey v Bentinck [1893] 1 QB 185 (refd)

Chan Yuet Chun @ Chan Oi Lin (Berniaga sebagai Wing Sun Trading Co) v Martego Sdn Bhd [1996] MLJU 573 (refd)

Clarkson v Davies [1923] AC 100 (refd)

County of Gloucester Bank v Rudry, etc, Co [1895] 1 Ch 629 (refd)

Drummond-Jackson v British Medical Association [1970] 1 WLR 688; [1970] 1 All ER 1094 (refd)

Duck v Tower Galvanizing Co [1901] 2 KB 314 (refd)

Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd [1915] AC 847 (refd)

Edler v Auerbach [1949] 2 All ER 692 (refd)

Egerton v Brownlow 4 HLC 151 (refd)

Enderby Town Football Club Ltd v Football Association Ltd [1971] 1 Ch 591 (refd)

Eng Mee Yong & Ors v Letchumanan [1979] 2 MLJ 212 (refd)

Evanturel v Evanturel (1874) LR 6 PC 1 (refd)

Fairclough Building Ltd v Port Talbot Borough Council (1992) 33 Comm LR 24 (refd)

Fender v St John-Mildmay [1938] AC 1 (refd)
Gibson v Manchester City Council [1978] 2 All ER 583 (refd)
Grey v Ellison (1856) 1 Giff 436 (refd)
Hawkesbury Development Co Ltd v Landmark Finance Pty Ltd (1970) 92 WN (NSW) 199 (refd)
Henderson v Astwood, Astwood v Cobbold, Cobbold v Astwood [1894] AC 150 (refd)
Holman v Johnson (1775) 1 Cowp 341 (refd)
Howard v Shilstar Container Transport Ltd [1990] 3 All ER 366 (refd)
Ingram v IRC [1997] 4 All ER 395 (refd)
K Murugesu v Nadarajah [1980] 2 MLJ 82 (refd)
Kelner v Baxter (1866) LR 2 CP 174 (refd)
Kencor Holdings Ltd v Govt of Saskatchewan (1991) 6 WWR 717 (refd)
Kiwi Brands (M) Sdn Bhd v Multiview Enterprises Sdn Bhd [1998] 6 MLJ 38 (refd)
Koid Hong Keat v Rhina Bhar [1989] 3 MLJ 238 (refd)
Kreditbank Cassel GmbH v Schenkers Ltd [1927] 1 KB 826 (refd)
Land Credit Co of Ireland, Re (1869) LR 4 Ch 460 (refd)
Lo Su Tsoon Timber Depot v Southern Estate Sdn Bhd [1971] 2 MLJ 161 (refd)
Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd & Anor [1984] 2 MLJ 105 (refd)
Mahima Singh & Ors v Buldev Singh [1975] 1 MLJ 173 (refd)
Mahmoud & Ispahani, Re [1921] All ER 217; [1921] 2 KB 716 (refd)
Mahmud bin Adam @ Mahmud bin Zuhdi bin Adam v Mat bin Ismail [1984] 1 CLJ 99 (refd)
Mahony v East Holyford Mining Co (1875) LR 7 HL 869 (refd)
May v Butcher Ltd [1934] 2 KB 17 (refd)
McGregor v McGregor (1888) 21 QBD 424 (refd)
Merchantile Bank of India v Chartered Bank of India, Australia & China [1937] 1 All ER 231 (refd)
Merritt v Merritt [1970] 2 All ER 760 (refd)
Miles v Bull [1969] 1 QB 258; [1968] 3 All ER 632 (refd)
Montefiore v Menday Motor Components Co Ltd [1918] 2 KB 241 (refd)
Moore v Lawson (1915) 31 TLR 418 (refd)
Mustafa Osman v Lee Chua & Anor [1996] 2 MLJ 141 (refd)
Ng Kian Chong & Ors v Saw Seng Khee [1994] 3 MLJ 691 (refd)
North-Western Salt Co Ltd v Electrolytic Alkali Co Ltd [1914–15] All ER 752 (refd)
Northside Developments Pty Ltd v Registrar-General (1990) 93 ALR 385 (refd)
Pearce v Merriman [1904] 1 KB 80 (refd)
Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors [1998] 1 MLJ 465 (distd)
Pet Far Eastern (M) Sdn Bhd v Tay Young Huat & Ors [1999] 5 MLJ 558 (refd)
Raja Zainal Abidin bin Raja Hj Tachik & Ors v British-American Life & General Insurance Bhd [1993] 3 MLJ 16 (refd)

Rattan Chand Hira Chand v Askar Nawazjung (deceased) (1991) 3 SCC 67 (refd)
Ridley v Lee [1935] Ch 591 (refd)
Rodgriguez v Speyer Bros [1919] AC 59 (refd)
Royal British Bank v Turquand (1856) 6 E & B 327 (refd)
Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong [1998] 3 MLJ 151 (refd)
Scott v Brown, Doering Mc Nab & Co [1892] 2 QB 724 (refd)
Seidler v Schallhofer [1982] 2 NSWLR 80 (refd)
Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd [1994] 2 MLJ 97 (refd)
Snell v Unity Finance Ltd [1963] 3 All ER 50 (refd)
South Hetton Coal Co v Haswell Shotton & Easington Coal and Coke Co [1898] 1 Ch 465 (refd)
Sri Kajang Rock Products Sdn Bhd v Mayban Finance Bhd & Ors [1992] 1 CLJ 204 (refd)
Sunshine Securities (Pte) Ltd & Anor v Official Receiver and Liquidator of Mosbert Acceptance Ltd [1978] 1 MLJ 57 (refd)
Tac Construction & Trading v Bennes Engineering Bhd [1999] 2 CLJ 117 (refd)
Theresa Chong v Kin Khoon & Co [1976] 2 MLJ 253 (refd)
Thong Foo Ching & Ors v Shigenori Ono [1998] 4 MLJ 585 (refd)
United Merchant Finance Bhd v Majlis Agama Islam Negeri Johor [1999] 1 MLJ 657 (distd)
Wenlock v Moloney [1965] 1 WLR 1238 (refd)
Windle, Re [1975] 3 All ER 987 (refd)
Wingan v English and Scottish Law Life Insurance Association [1909] 1 Ch 291 (refd)
Wong Hon Leong David v Noorazman bin Adnan [1995] 3 MLJ 283 (refd)

Legislation referred to

Companies Act 1965 s 20
Contracts Act 1950 ss 2(d), (e), 24(e)
Rules of the High Court 1980 O 14 r 3(1), O 18 r 19(1)(a), (b), (d)

Azrul bin Abdul Aziz with *Mohd Noor bin Darus* (*Fisol, Aziz & Mohd Noor*) for the plaintiff.

Ahmad Fadzil Mohd Perdaus, Ahmad Azra bin Salleh & S Maniarasan (*Hafidz & Azra*) for the defendant.

Abdul Malik Ishak J:

Enclosure 19

By way of encl 6 of prayer (a), the plaintiff sought to enter summary judgment against the defendant pursuant to O 14 of the Rules of the High Court 1980 ('the RHC') and, by way of prayer (b) thereto, the plaintiff

sought for costs in the cause. Enclosure 6 was dated 7 August 2000 and it was supported by an affidavit of the plaintiff himself that was affirmed on 4 August 2000 as seen in encl 5. In response thereto, the defendant affirmed an affidavit in reply through Wan Ahmad Abd Nasir bin Wan Dagang ('Wan Ahmad') on 7 September 2000 and this can be seen in encl 8.

In reply to encl 8 would be encl 12 which was an affidavit of the plaintiff — Ahmad Zaini bin Japar, that was affirmed on 15 September 2000. There was a 'notice of intention to use an affidavit' which was undated as seen in encl 18 and that was notice to use an affidavit in support affirmed by Wan Ahmad on 4 October 2000 as seen in encl 16. Basically, encl 16 was meant to respond to encl 12. Then there was the second affidavit in reply of the plaintiff that was affirmed on 17 October 2000 and this can be seen in encl 15 which was meant to reply to encl 16.

The learned deputy registrar heard encl 6 and on 8 January 2001 she allowed the plaintiff's application in encl 6 with costs. Aggrieved by the decision of the learned deputy registrar, the defendant filed an appeal to the judge in chambers as seen in encl 19.

Enclosure 20

By way of encl 14 of prayer (a), the defendant sought to strike out the plaintiff's writ of summons together with the statement of claim under O 18 r 19(1)(a), (b) and (d) of the RHC and under the inherent jurisdiction of the court. By prayer (b) to encl 14, the defendant sought for costs and under prayer (c) thereto the defendant sought for other reliefs which the court would think fair and reasonable. Enclosure 14 was dated 20 September 2000.

Now, encl 14 was supported by an affidavit affirmed by Wan Ahmad as seen in encl 16. While encl 15, which was the second affidavit in reply of the plaintiff, served as a response to encl 16. There was a 'Notice of intention to use affidavits' dated 29 September 2000 as seen in encl 17 for the purpose of using the affidavit in reply of Wan Ahmad that was affirmed on 7 September 2000 as seen in encl 8 as well as to use the affidavit of the plaintiff that was affirmed on 4 August 2000 as reflected in encl 5. At the same time, notice was also given in encl 17 to use the plaintiff's affidavit in encl 12.

The learned deputy registrar heard encl 14 and on 8 January 2001 she dismissed the defendant's application with costs. This prompted the defendant to file a notice of appeal to the judge in chambers as seen in encl 20.

This judgment revolved entirely on encls 19 and 20.

Facts of the case

From the statement of claim in encl 1, the following facts may be pieced together.

Sometime in the month of August 1997, the plaintiff, Ahmad Zaini bin Japar, was requested by the defendant, namely, TL Offshore Sdn Bhd

(which must necessarily include the defendant's employees, and its agents) to procure a contract with Petronas Carigali Sdn Bhd ('Petronas Carigali'). To be precise, the defendant requested the plaintiff through oral negotiations to provide advisory services, assistance, usage of skill, knowledge and endeavours to hold and have discussions as well as negotiations with several bodies, agencies. Government and non-Governmental authorities on behalf of the defendant with the sole intention of procuring a contract for the defendant with Petronas Carigali. In furtherance of the plaintiff's mission, an oral agreement was reached between the plaintiff and the defendant (which includes the defendant's employees and its agents) whereby by way of a consideration for securing the contract with Petronas Carigali, the plaintiff shall be paid for the advisory services an amount equivalent to 1% of the contract value limited to a maximum amount of RM12m. The plaintiff was led to believe that he would obtain the maximum consideration as promised and/or agreed to by the defendant and the quantum would be 1% of the value of the contract limited to RM12m. Acting upon the consideration as promised by the defendant, the plaintiff carried out his part of the bargain. The plaintiff rendered and made available the advisory services and he succeeded in securing for the defendant a contract bearing number PCSB 2100 21R to the value of RM2,107,103,013 from Petronas Carigali. That was no mean feat. Thus, in pursuance of that agreement between the plaintiff and the defendant a sum, of RM12m was due and payable by the defendant to the plaintiff. So far the defendant had paid the plaintiff a sum of RM700,000 for the services rendered and that payment was made in accordance with the agreement and in the following manner as agreed by both parties:

(1) the first payment of RM500,000 was paid to Solid Ballot (M) Sdn Bhd, a company incorporated under the Companies Act 1965; and

(2) the second payment in the sum of RM200,000 was paid to Grudimas Sdn Bhd, a company incorporated under the Companies Act 1965.

The balance in the sum of RM11,300,000 (RM11.3m) was still due and payable by the defendant to the plaintiff. It was the stand of the plaintiff that the defendant had admitted owing that balance sum of RM11.3m to the plaintiff. Acting prudently and within the confines of the law, the plaintiff proceeded to demand the payment of RM11.3m which had not been paid, but the defendant simply failed and/or refused to pay that balance sum or any part thereof. Through his solicitors Messrs Fisol, Aziz & Associates, a letter of demand dated 28 April 2000 was extended to the defendant demanding that the balance sum of RM11.3m be paid to the plaintiff. But to date the defendant has failed and/or refused to pay the balance sum of RM11.3m or any part thereof. For these reasons, the plaintiff sought for the following prayers:

(a) the balance sum that was due and payable in the sum of RM11.3m;

(b) interest at the rate of 8% annually on the sum of RM11.3m from the date of judgment until the date of realisation;

(c) costs; and

(d) any further or other relief as the honourable court deems fit and proper.

The defendant, however, had yet to file its statement of defence.

In seeking summary judgment under O 14 of the RHC as reflected in encl 6, the plaintiff made it quite plain that the defendant had yet to pay the balance sum of RM11.3m being payment for services rendered in securing a contract from Petronas Carigali in favour of the defendant.

In seeking to strike out the plaintiff's writ of summons together with the statement of claim under O 18 r 19(1)(a), (b) and (d) of the RHC as reflected in encl 14, the stand of the defendant was that the action filed by the plaintiff did not disclose any reasonable cause of action. It was also the stand of the defendant that the action filed by the plaintiff was scandalous, frivolous or vexatious. Finally, the stand of the defendant was that the action filed by the plaintiff was an abuse of the process of the court.

Reverting back to the summary judgment application in encl 6, the affidavit in support as reflected in encl 5 contained interesting details that should be alluded to in this judgment. It is this: that the plaintiff had by letter dated 14 August 1998 written to Tan Sri Halim Saad in regard to the contract bearing number PCSB 210021 R and that letter was marked as exh 'AZJ-1' of encl 5 and it was worded in perfect Malay language:

Haji Ahmad Zaini Japar
No 14-A, Tingkat Satu,
Bangunan Dato' Ali
Jalan Tunku Ibrahim
05000 Alor Setar
Kedah Darul Aman

14th August 1998
Yang Berbahagia Tan Sri Halim Saad
Penthouse 4th Floor
Bangunan MCOBA
No. 42, Jalan Syed Putra
50460 Kuala Lumpur

Per: Kontrak PCSB -210021R

Berhubung dengan perkara di atas, perbincangan saya dan Yang Berbahagia Tan Sri pada 21hb Julai, 1998 jam 12.00 tengahari adalah dirujuk. Di sini saya terlebih dahulu ucapkan jutaan terima kasih di atas kesudian Tan Sri berbincang dan melayan kunjungan saya.

2. Adalah diharapkan agar pihak Yang Berbahagia Tan Sri dapat meneruskan pembayaran kepada pihak saya seperti yang telah dijanjikan oleh pihak TL Offshore.

3. Saya berharap mendapat tindak balas segera dalam tempoh sepuluh (10) hari dari tarikh surat ini.

Sekian, kerjasama daripada Yang Berbahagia Tan Sri amat saya sanjungi.

A Sgd. (Illegible)
(Haji Ahmad Zaini Japar)
Tel: 012-2022405
04-7340618

s.k
B 1. Tuan Syed Mohamad Aiwi Syed Mustapha
2. En. Abdul Wahab Sulaiman

Tan Sri Halim Saad did not personally respond to the plaintiff's letter but an executive director of the defendant's company by the name of Syed Mohd, Aiwi Syed Mustaffa ('Syed Aiwi') responded and his letter was the C decisive blow that crippled encl 14 and eventually encl 20. Syed Alwi's letter showed, on the balance of probabilities, that the plaintiff had indeed secured the contract for the defendant and that the plaintiff would be paid 'up to the sum of RM12m, being 1% of the contract value'. Syed Alwi's letter was exhibited as exh 'AZJ-2' of encl 5 and it was written in the English language:

D 'TL OFFSHORE SDN BHD
(Company No. 198612-P)

September 5, 1998

Tuan Haji Ahmad Zaini Japar
E No 14-A Tingkat Satu
Bangunan Dato' Ali
Jalan Tunku Ibrahim
05000 Alor Setar
Kedah Darul Aman

F Tuan Haji,

I refer to your letter dated August 14, 1998 addressed to Yang Berbahagia Tan Sri Halim Saad, which was copied to me.

I believe you are already in receipt of the first payment of RM500,000 paid to your company, Solid Ballot (M) Sdn Bhd, and RM200,000 to Grudimas Sdn Bhd, actions which are indicative of our sincerity in honoring our G promise.

I would like to affirm that as agreed earlier, we would endeavour to pay you for your marketing services in procuring for TL Offshore Sdn Bhd the contract PCSB 210021R, up to the sum of RM12m, being 1% of the contract value.

H However, I have a problem at the moment in convincing Crest Petroleum Bhd, the shareholders of TL Offshore-Probadi Division, to execute the remaining progress payments. I am sure this is only a temporary setback in view that the services you have rendered have enabled us to successfully secure the contract and to date, the said contract has been progressing without any hitches.

I We will inform you as to when we are ready to effect the remaining payments.

Thank you for your kind understanding.

Yours sincerely

Sgd.
Syed Mohd Aiwi Syed Mustaffa
Executive Director

and it clearly showed, inter alia, that payments that were effected to Solid Ballot (M) Sdn Bhd and Grudimas Sdn Bhd were in fact payments made to the plaintiff's companies. This point was also alluded to by Messrs Fisol, Aziz & Associates, solicitors for the plaintiff in their letter of demand to the defendant dated 28 April 2000 and that letter was also exhibited as exh 'AZJ-3' of encl 5 and it was worded as follows:

Date: 28 April 2000

T L Offshore Sdn Bhd
Tingkat 10, Menara 1
Faber Towers
Jalan Desa Bahagia, Taman Desa
Off Jalan Klang Lama
58100 Kuala Lumpur

and/or

T L Offshore Sdn Bhd
Tingkat 4, Menara 2
Faber Towers
Jalan Desa Bahagia, Taman Desa
Off Jalan Klang Lama
58100 Kuala Lumpur

AR REGISTERED
CERTIFICATE OF POSTING

Re: Monies Due to Tuan Haji Ahmad Zaini Bin Japar for procuring Carigali Contract

We act for Tuan Haji Ahmad Zaini Bin Japar.

We have been informed by our client that upon your request, our client agreed to advise, provide and assist, use his skill and knowledge and best endeavours, negotiate with various bodies, agencies and authorities to procure a contract (No. PCSB 210021 R) with Petronas Carigali Sdn Bhd.

We have also been informed by our client that it was agreed in consideration of our client successfully procuring the said contract, with Petronas Carigali on your behalf, you will pay him up to RM12,000,000 being 1% of the total contract value entered between you and Petronas Carigali Sdn Bhd. We have been informed by our client that as a result of our client's assistance, negotiation and endeavours, you were able to secure a contract with Petronas Carigali Sdn Bhd for the total sum of RM2,107,103,013. We have been informed by our client that in accordance with the arrangement/contract a sum of RM12,000,000 has become due and payable to our client.

We have been informed by our client that you have, as of date, paid a sum of RM700,000 (which was upon our client's request, paid to his companies), but have failed to pay the balance of RM11,300,000 despite requests.

PLEASE BE INFORMED AND TAKE NOTICE we have been instructed by our client to demand from you which we hereby do, the sum of RM11,300,000.

TAKE FURTHER NOTICE that if we as Solicitors for our client are not in receipt of the sum RM11,300,000 within seven (7) days of receipt of this letter we will file an action against you without further reference to you and you will be liable for all costs incurred.

Yours faithfully,

tt (Illegible).
cc Client

In encl 5, the plaintiff further deposed that it was within his knowledge and that he verily believed that the defendant had incurred the debt and that the payment of the balance sum of RM11.3m had not been effected and 'is still due and owing'. The plaintiff further deposed in encl 5 to this effect:

I verily believe that the defendant has no defence to this action.

and for these reasons, the plaintiff sought for an order in terms of his application in encl 6. By way of a rebuttal, Wan Ahmad affirmed an affidavit in reply in encl 8 for the defendant and there he alluded to the fact that the defendant was entitled to file its defence after the application for summary judgment in encl 6 had been disposed of. In encl 8, Wan Ahmad deposed as follows:

(1) That he verily believed that the defendant has a defence on the merits to the claim by the plaintiff and the defendant denied that it is indebted to the plaintiff for any amount whatsoever.

(2) That the averments by the plaintiff were untrue and concocted. The defendant had never instructed nor requested the plaintiff in regard to Petronas Carigali Contract No: PCSB 2100 21R.

(3) That the defendant had never at any time appointed, instructed or requested the plaintiff to provide any consulting services in connection with the award of the Petronas Carigali contract. The defendant too did not authorize the plaintiff to act on behalf of the defendant nor to represent the defendant in any negotiation with any party in connection with the award of the Petronas Carigali contract.

(4) That he verily believed that the allegation by the plaintiff that the defendant had orally agreed with the plaintiff to make the payment amounting to RM12m in connection with the Petronas Carigali contract valued at RM2,107,103,013 was untrue and unsupported by any proof.

(5) That it was inconceivable for the plaintiff to allege that the defendant had agreed to pay the plaintiff the sum of RM12m or 1% of the value of the Petronas Carigali contract as consideration for the plaintiff's services.

(6) That he verily believed that there was no agreement between the plaintiff and the defendant in connection with the Petronas Carigali contract and he verily believed that the defendant had been awarded the said contract based on the ability and competence of the defendant without any assistance or contribution from the plaintiff.

(7) That he verily denied that the defendant had ever made any payment amounting to RM700,000 to the plaintiff and he further denied that the defendant had any knowledge of any payments made to Solid Ballot (M) Sdn Bhd and Grudimas Sdn Bhd.

(8) Alluding to the plaintiff's letter dated 14 August 1998 that was addressed to Tan Sri Halim Saad, he verily believed that the said Tan Sri did not, in law, have any direct connection with the defendant.

(9) That the authenticity of Syed Alwi's letter was disputed because that letter was not in the defendant's record or possession.

(10) That Syed Alwi's letter only came to the knowledge of the defendant after the suit and the application for summary judgment were filed and served onto the defendant.

(11) That the defendant was shocked at the existence of Syed Alwi's letter because a letter of that nature should have been brought to the knowledge of the defendant earlier and not after a lapse of two years.

(12) It was improbable that Syed Alwi's letter was written by the defendant in the ordinary course of its business.

(13) Syed Alwi's letter was challenged as being defective in relation to its format because it did not contain any reference number nor did it refer to a specific title.

(14) Syed Alwi's letter was also challenged in regard to the font that was used in the body of the letter which was said to be different from the font that was used at the closing of the letter with the name of the author where the signature was placed.

(15) In regard to the notice of demand, he verily believed that the defendant was not indebted to the plaintiff and, consequently, he prayed that the plaintiff's application in encl 6 be dismissed with costs.

The plaintiff responded by way of an affidavit in encl 12 and it was a point by point rebuttal of Wan Ahmad's averments in encl 8. Basically the plaintiff deposed that he was advised by his solicitors to say that the defendant had no defence to the claim in the action and that the defendant was and is still owing the sum of RM11.3m. The plaintiff deposed that whatever was deposed to in the statement of claim was true and it was not fabricated. It was the stand of the plaintiff that both Syed Aiwi and one Abdul Wahab bin Sulaiman ('Wahab') had requested for the plaintiff's consultancy services and the plaintiff had successfully rendered the services as requested by procuring the Petronas Carigali contract for the defendant. Syed Alwi's letter was said to be crucial in explaining the scenario of the whole case and it was the stand of the plaintiff that it was highly improper for the defendant to deny the contents of the said letter. In short, the stand of the plaintiff was that the statement of claim was true and its contents were not concocted at all. The plaintiff denied the averments of Wan Ahmad in para 7, 8 and 9 of encl 8 as untrue. According to the plaintiff, the defendant:

(1) had appointed, instructed or requested the plaintiff to provide the consultancy services in connection with the award of the Petronas Carigali contract;

(2) had authorized the plaintiff to act on behalf of the defendant and to negotiate with any party in connection with the award of the Petronas Carigali contract;

(3) had orally agreed with the plaintiff to make the payment to the plaintiff amounting to RM12m in connection with the Petronas Carigali contract valued at RM2,107,103,013; and

(4) had agreed to pay the plaintiff the sum of RM12m or 1% of the value of the Petronas Carigali contract as consideration for the plaintiff's services.

The plaintiff further denied that the defendant was awarded the Petronas Carigali contract based entirely on the ability and competence of the defendant. On the contrary, it was the plaintiff's case that it was through the defendant's servants or agents, namely, Syed Aiwi and Wahab that the plaintiff's consultancy services and assistance were sought for and it was solely through the endeavours of the plaintiff that the defendant had successfully secured the Petronas Carigali contract to the tune of RM2,107,103,013. It was now not open to the defendant to deny the existence of the oral agreement entered into between the defendant and the plaintiff, so said the plaintiff in his affidavit in encl 12. Syed Alwi's letter was said to be the symbol of the everlasting contract between the parties. In regard to the payment of the sum of RM700,000, this was what the plaintiff had to say:

(1) that the defendant had made progressive payments to the tune of RM700,000 by advancing a sum of RM500,000 to Solid Ballot (M) Sdn Bhd and a sum of RM200,000 made out to Grudimas Sdn Bhd;

(2) that the payment of the sum of RM500,000 to Solid Ballot (M) Sdn Bhd was made on a staggering basis and the particulars thereof were as follows:

	Bank	Date	Cheque No:	Amount
(a)	BOC*	1.4.98	125777	RM100,000
(b)	BOC*	1.4.98	125778	RM100,000
(c)	BOC*	1.4.98	125779	RM100,000
(d)	BOC*	1.4.98	125780	RM100,000
(e)	BOC*	1.4.98	125781	RM100,000
(BOC* = Bank of Commerce)			Total	RM500,000

and it is interesting to note that the photostat copies of these five cheques together with the bank slip dated 1 April 1998 were exhibited and marked as exh 'AZJ-4' of encl 12.

(3) that in regard to the payment of RM200,000 to Grudimas Sdn Bhd, the copies of the relevant cheques evidencing staggering payments were not in the possession of the plaintiff, but nevertheless the plaintiff averred that the reprinted pay-in slip dated 12 May 1998 marked as exh 'AZJ-5' of encl 12 showed the following scenarios:

	Bank	Date	Cheque No:	Amount
(a)	BOC*	N/A*	163003	RM100,000.00
(b)	BOC*	N/A	163004	RM100,000.00
(BOC* = Bank of Commerce)			Total	RM200,000.00
N/A* = Not available)				

Interestingly, with regard to the averment by the defendant that Tan Sri Halim Saad did not have any direct connection with the defendant, the response by the plaintiff was worth looking into. The plaintiff responded and he matter-of-factly stated that he knew the said Tan Sri and he had discussions with him even before the letter dated 14 August 1998 that was addressed to the said Tan Sri was issued. There was a lame response by the defendant through Wan Ahmad in encl 16 on this point. The plaintiff further averred that he had requested Tan Sri Halim Saad for help in order to expedite the payment of the balance sum of RM11.3m bearing in mind that the said Tan Sri was a director of Probadi Sdn Bhd and that Probadi Sdn Bhd was one of the majority shareholders of the defendant. It must be recalled that Syed Alwi's letter alluded to the connection between Probadi Sdn Bhd with the defendant. Proceeding further, the plaintiff averred that there was no basis to question the authenticity of Syed Alwi's letter on the mere grounds that that letter was not in the custody of nor kept in the archive of the defendant's company as these grounds were said to be of no concern to the plaintiff at all. These grounds too would certainly not affect the rights of the plaintiff under the law. At any rate, it is interesting to note that Syed Alwi's letter was written after the sum of RM700,000 was disbursed to the two companies that were said to be owned by the plaintiff.

The plaintiff further averred that it was not true that Syed Alwi's letter only came to the knowledge of the defendant after the matter had been filed in court. The plaintiff laid stress to the fact that Syed Aiwi had signed that letter in his capacity as the executive director of the defendant. The plaintiff reiterated that the internal affairs of the defendant were of no concern to the plaintiff and would not affect the rights of the plaintiff under the law. The plaintiff averred that the necessity to introduce Syed Alwi's letter would not arise if the defendant had kept its promise to pay the plaintiff for the consultancy services that were rendered. The plaintiff averred that he had no choice but to initiate the legal proceedings against the defendant and for this exercise, Syed Alwi's letter was introduced. For these reasons, the plaintiff averred that the delay of two years before revealing the existence of Syed Alwi's letter should not be questioned by the defendant. Of crucial importance would be the averments that the defendant did not dispute that Syed Aiwi was the executive director of the defendant and that Syed Aiwi

A has had dealings with the plaintiff. In regard to the issues that the font in Syed Alwi's letter was different and that it had no reference number and further it did not refer to a specific file, the rebuttals were that they were of no concern to the plaintiff and that those issues should be referred by the defendant to Syed Aiwi for an explanation. It was the stand of the plaintiff that the internal affairs of the defendant which exhibited inefficiency were
B of no concern to the plaintiff nor would it affect the legal rights of the plaintiff under the law. Having said all these, the plaintiff averred that he verily believed that the defendant was and is presently owing the plaintiff the sum of RM11.3m and for these reasons the plaintiff prayed that the O 14 application be allowed.

C By way of a reply, the defendant relied on encl 16 which was the affidavit of Wan Ahmad. In general terms. Wan Ahmad averred that the plaintiff's writ of summons and the statement of claim were frivolous, vexatious and obviously unsustainable and he sought to strike out the plaintiff's action forthwith. Alluding to the consultancy services that were rendered by the plaintiff, Wan Ahmad deposed that the plaintiff did not give
D the details as to the consultancy services which the plaintiff had rendered at the behest of the defendant's officers in the persons of Syed Aiwi and Wahab. The plaintiff too, so it was averred by Wan Ahmad, had not explained the role played by him in securing the Petronas Carigali contract in favour of the defendant. It was further averred that the plaintiff had failed
E to provide any proof whatsoever to show that an oral agreement existed between the parties. It was the stand of the defendant that the contract was awarded by Petronas Carigali together with the relevant authority after the defendant had undergone the various tender exercises that were required. It was said that the value of the contract and the payment claimed by the plaintiff was quite substantial and that it also involved complex technical
F matters and it was for these reasons that the defendant argued that it was unreasonable to assume that a binding contract was entered between the parties purely on the basis of an oral agreement. It was also said that the plaintiff was unable to categorically state whether the payment that was allegedly agreed upon orally was dependent on the award of the contract per se or whether it would be dependent upon the contract being awarded as a
G result of the consultancy services that were rendered by the plaintiff.

Wan Ahmad was advised to say and he verily believed that there was no valid consideration governing the oral agreement because the award of the Petronas Carigali contract was totally dependent on the decision of Petronas Carigali when it received a tender or an offer. Wan Ahmad
H emphasized that the plaintiff was unable to provide any basis or facts that can be accepted under the law in connection with the plaintiff's claim. All the averments of the plaintiff together with the documents that were exhibited — ranging from exhs 'AZJ-I' to 'AZJ-5', were said to be inconsequential in that they were not related to the alleged services rendered by the plaintiff. It was averred that the defendant was still in the
I dark and was unclear as to whether the balance sum of RM11.3m was claimed by the plaintiff as consideration for services rendered or as consideration for being allegedly responsible for the award of the Petronas

Carigali contract to the defendant. It was pointed out that the plaintiff was trying to connect the payments that were made to the two companies with the plaintiffs claim without assigning any reason whatsoever. It was the stand of the defendant that these two payments to the two companies had no connection whatsoever with the plaintiff. Wan Ahmad proceeded further and he said that he was surprised as to how the plaintiff could allege that the defendant was indebted to him for the sum of RM11.3m based purely on the payments made to the two companies without explaining the plaintiffs connection to such payments. The plaintiff too, it was said, failed to provide any proof to connect his claim with the payments that had been made to the two companies and in this connection it was pointed out that exhs 'AZJ-4' and 'AZJ-5' as reproduced earlier were of no help to the plaintiff at all. In regard to Tan Sri Halim Saad, whose name was bandied around in the plaintiffs letter dated 14 August 1998, the defendant had this to say:

(1) that letter made reference to a complaint that was allegedly made to an individual (referring to Tan Sri Halim Saad) and such an averment should not have been made; and

(2) that letter reflected the personal feelings of the plaintiff and it was not based on any proof or any right under the law,

and as I said earlier, these were lame excuses and nothing else. Not to be outwitted, the defendant held the view that the plaintiff's claim was unsupported by any proof. The plaintiff's claim too, so said the defendant, was based on assumptions and presumptions and that being the case, it was simply an abuse of the process of the court. Since the plaintiff was said to have failed in showing that he was responsible for the award of the Petronas Carigali contract to the defendant, the defendant prayed that the plaintiff's writ of summons and the statement of claim be struck out under O 18 r 19 of the RHC as alluded to in encl 14.

In encl 15, the plaintiff replied to the affidavit in support of the defendant as seen in encl 16. There, the plaintiff averred that he was advised by his solicitors to say that the defendant had no defence to the plaintiffs claim. And that the defendant's application pursuant to O 18 r 19 of the RHC had no basis at all. It was said that the defendant intentionally attempted to delay the plaintiff's application in encl 6 for summary judgment under O 14 of the RHC. It was said that the defendant knew that the plaintiff's claim was true based on the admission of the defendant by way of a letter emanating from Syed Aiwi where the contents thereof were not denied by the defendant. The plaintiff averred that his claim was not frivolous, nor vexatious, nor scandalous but on the contrary it was the defendant who was abusing the process of the court by filing the O 18 application notwithstanding the existence of Syed Alwi's letter. It was said that the authenticity of Syed Alwi's letter was not an issue. Syed Alwi himself did not affirm an affidavit to deny that he had written that letter. The plaintiff affirmed that the defendant was and is justly and truly indebted to him in the sum of RM11.3m and for these reasons the plaintiff prayed that his O 14 application be allowed with costs and the defendant's application under O 18 r 19 of the RHC be dismissed with costs.

A The plaintiff continued to aver that the consultancy services rendered by him to enable the defendant to secure the Petronas Carigali contract were within the knowledge of the defendant's own executive director in the person of Syed Alwi and another officer by the name of Wahab. Had the defendant maintained its records in proper order, the defendant would be in a position to retrieve and identify Syed Alwi's letter with ease. But this B was not to be. The plaintiff relied on Syed Alwi's letter to drive home the message that there was indeed an oral agreement between the parties. The plaintiff pointed out that the defendant merely denied the existence of the relationship between the parties. Plainly and simply the defendant made a bare denial that Syed Alwi was the servant or agent of the defendant. It was the stand of the plaintiff that there was a binding agreement between the C parties and that the defendant was legally bound by it. The plaintiff averred that the documents marked as 'AZJ-1' to 'AZJ-5' were self-explanatory as they clearly showed the existence of not only the agreement between the parties but also to the fact there was part payment of the contract sum. As a last salvo, the plaintiff averred that the defendant should have verified with D Syed Alwi in regard to the truth of the contents of his letter and for all these reasons, the plaintiff prayed that his O 14 application be allowed with costs and the defendant's O 18 application be dismissed with costs.

Arguments of the parties, the law and its ramifications

E This was a long drawn matter. The parties were accorded every right to respond and submit to their hearts' content. It was a submission on both sides that went smoothly. No stones were left unturned. Mr Azrul bin Abdul Aziz ('Mr Azrul') assisted by Mr Mohd Noor bin Darus ('Mohd Noor') acted for the plaintiff while Mr Ahmad Fadzil bin Mohd Perdaus ('Mr Fadzil') assisted by Mr Ahmad Azra bin Salleh ('Mr Azra') acted for F the defendant. These fine lawyers argued strenuously for their respective clients.

Mr Fadzil submitted at great length and it was his submission that the statement of claim and the affidavits thereto were based on the supposed oral agreement that was entered by the plaintiff with the agents of the G defendant — namely, Syed Alwi and Wahab. The oral agreement was supposedly for the payment of the services rendered by the plaintiff in procuring the Petronas Carigali contract. The central point of the plaintiff's case was in relation to Syed Alwi's letter and the defendant vehemently denied any knowledge of that letter. That denial was premised on the ground that there was no oral agreement. Mr Fadzil submitted that the H defendant had obtained the Petronas Carigali contract through its own efforts independent of any help from the plaintiff. It was his submission that the plaintiff did not provide any information pertaining to the efforts which the plaintiff had put in, in order to secure the Petronas Carigali contract. It was quite apparent that the plaintiff sought to support his claim by producing evidence of payments to the two companies and the plaintiff I contended that those two payments were in fact meant for the plaintiff bearing in mind that the two companies were owned by the plaintiff. The joint sums received by the two companies came up to RM700,000 and this

was said to be part-payment of the agreed sum of RM12m. But the defendant denied that any part-payments were ever made to the two companies. In any event, Mr Fadzil ingeniously argued that the part payments went to the two companies and the plaintiff did not show that he was entitled to receive those payments. The defendant reiterated that no evidence was forthcoming from the plaintiff to show that he was really entitled to receive the balance sum of RM11.3m from the defendant. The defendant specifically denied any knowledge of the oral agreement purportedly entered between the plaintiff and the defendant's agents. The defendant too, went to the extreme in denying the existence of that oral agreement. But, with respect, all these submissions must be weighed against the background of Syed Alwi's letter. That very letter admitted and confirmed the existence of the contract between the parties for the sum of RM12m. In that letter the 'marketing services' rendered by the plaintiff was emphasized and it was through that kind of service that the plaintiff procured the Petronas Carigali contract for the defendant. The defendant, according to Mr Fadzil, denied the contents of Syed Alwi's letter. The defendant too denied the truth of Syed Alwi's letter by questioning its authenticity. It was, according to Mr Fadzil, not a mere bare denial. The defendant refused to acknowledge, in encl 16, the existence of any agreement and the defendant averred through Wan Ahmad that the Petronas Carigali contract was awarded to the defendant on the defendant's own initiative and through the required tender procedures.

Taking the cue, Mr Azra submitted that the plaintiff was making a bare and a bald submission in regard to the existence of the supposed contract. He submitted that there was no contract at all between the parties. He submitted that for summary judgment to succeed, such bare and bald assertions and allegations were not enough. He submitted that the plaintiff failed to provide clear documentary evidence of a written agreement executed by both parties where by the court could readily infer the terms and conditions that have been agreed between the parties. He submitted that the plaintiff alleged that because there was part-payment to the plaintiff through the two companies, that constituted satisfactory evidence of the existence of the contract. According to Mr Azra, the plaintiff had not provided proof in his pleadings to show that the two companies belonged to the plaintiff. So it was submitted that the part-payment to the two companies did not constitute payment to the plaintiff. In regard to Syed Alwi's letter, Mr Azra echoed the sentiments of Mr Fadzil. He submitted that the reliability of Syed Alwi's letter was questionable. He questioned the existence of that letter and he too questioned the authenticity of that letter. These allegations of facts were said to be based on circumstances which surfaced too late in the day — in that it surfaced about one year after the so-called contract was concluded. At this juncture, Mr Azra cited the case of *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 and that was the decision of the then Supreme Court where Mohamed Azmi SCJ writing for the majority judgment succinctly said at p 408 of the report:

> Under an O 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit.

> Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. In our opinion, unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in an O 14 application. Thus, apart from identifying the issues of fact or law, the court must go one step further and determine whether they are triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue.

and so the question to ask would be whether there was indeed a triable issue raised by the defendant. I would answer this question in the negative and it would be apparent in the course of this judgment that there was no triable issue at all. Earlier on in his judgment, his Lordship Mohamed Azmi SCJ cited and applied the speech of Lord Diplock in *Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212, and this was what his Lordship Mohamed Azmi SCJ said at p 408 of the report between paras 'A' to 'D':

> In our view, basic to the application of all those legal propositions, is the requirement under O 14 for the court to be satisfied on affidavit evidence that the defence has not only raised an issue but also that the said issue is triable. The determination of whether an issue is or is not triable must necessarily depend on the facts or the law arising from each case as disclosed in the affidavit evidence before the court. On the treatment of conflict of evidence on affidavits, Lord Diplock speaking in the Privy Council on *Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212 had this to say at p 217:
>
> > 'Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be'.
>
> Although Lord Diplock was dealing with an application for removal of caveat in that particular case, we are of the view that the above principle of law is relevant and applicable in all cases where a judge has to decide a case or matter on affidavit evidence.

And relying on these passages, Mr Azra submitted that the plaintiff must rely on 'undisputed contemporary documents.' The plaintiff relied heavily on two very important documents, namely:

(1) the plaintiff's letter dated 14 August 1998 as reproduced in the early part of this judgment; and

(2) the letter emanating from Syed Alwi which was reproduced earlier in this judgment.

The plaintiff too was relying on the payments to the two companies as part and parcel of his case. In these directions, the plaintiff relied on exhs 'AZJ-4' and 'AZJ-5' of encl 12 which were reproduced in the early part of this judgment. The defendant simply pointed out that those documents were disputed and Mr Azra wrongly submitted that they were not contemporary

documents. In my judgment, these were contemporaneous documents as they were so close to the 1998 episode that no one could dispute it at all. Mr Azra submitted that the Petronas Carigali contract was obtained solely by the defendant by complying with the strict requirements of the tender procedures coupled with a very competitive tender price and pursuant thereto the defendant secured that contract on its own merits.

A case in point would be that of *Wong Hon Leong David v Noorazman bin Adnan* [1995] 3 MLJ 283, a decision of the Court of Appeal. Indeed the plaintiff relied heavily on that case to drive home the message that the defendant was truly indebted to the plaintiff in the sum of RM11.3m. The facts in that case may be stated as follows. There, the appellant was one of the directors of Wealth Sdn Bhd ('the company') which owned three lots of agricultural land in Kajang ('the land'). Since the company wanted to develop the land into a housing estate, it made an application to the land administrator for the district of Ulu Langat ('the land administrator') for conversion and sub-division of the land ('the application'). To expedite the application, the appellant sought the assistance of the respondent who said that he knew the Menteri Besar of Selangor. The appellant agreed to pay a fee of RM268,888 for the respondent's services. On 28 January 1991, the respondent wrote a letter to the Menteri Besar using the company's letterhead asking for assistance for an early approval of the application and the respondent signed that letter designated as a 'project manager'. The appellant later paid a sum of RM100,000 to the respondent when he produced the letter with the handwritten word 'Disokong' addressed to the land administrator and signed by the Menteri Besar. On 16 September 1992, the land administrator informed the company that its application had been approved. The respondent, by a letter dated 17 December 1991, wrote to the appellant to confirm the agreement between them whereby he was to receive an additional fee of RM100,000 if he assisted in resolving the problem of access to the land through a piece of adjoining land, namely, the Country Heights. The appellant considered the right of way to that adjoining land as a matter of importance as it would enhance the value of the land. The required right of way was eventually obtained. But the appellant refused to pay the remaining fee of RM168,888 and the additional fee of RM100,000. The respondent instituted summary proceedings against the appellant in the High Court for breach of contract. The appellant argued in his defence, inter alia, that: (i) there was no consideration for the alleged agreement; (ii) the respondent did nothing to earn his fee; and (iii) the agreement was void for illegality as the approval had already been granted at that point in time and the money was in fact a bribe. The judge rejected all the appellant's defences because they were not bona fide triable issues and the judge entered judgment for the sum of RM168,888 and granted unconditional leave to the appellant to defend in respect of the additional fee of RM100,000. The appellant appealed to the Court of Appeal. It was held by the Court of Appeal that since the respondent promised that he would assist in obtaining the approval of the application and in return the appellant promised to pay the respondent the sum of RM268,888 for that service, there was thus consideration under the

law. The consideration was in the form of an exchange of mutual promises, although executory, was held to be a good consideration. The Court of Appeal held that there was a binding agreement between the parties. It was also held that the argument that the respondent did nothing to earn his fee was unmeritorious. The respondent had expended his exertions in securing the Menteri Besar's support for the company's application, and the application had in fact been approved. The Court of Appeal held that the respondent's actions came within the framework of s 2(d) of the Contracts Act 1950 which provides that when the promisee has done something at the desire of the promisor, such act is said to be a consideration for the promise. The appellant alleged that he was deceived by the respondent into believing that the approval would be granted when in fact it had already been granted but the Court of Appeal held that such an allegation was unsupported by evidence. It appeared that from the facts, it was the appellant who asked the respondent for help. The Court of Appeal held that since respondent had obtained the approval of the application as promised, the respondent should receive the payment which had been agreed upon from the appellant.

But Mr Azra for the defendant strenuously pointed out that although the facts in *Wong Hon Leong David v Noorazman bin Adnan* were similar to the present case, yet that case, according to him, can readily be distinguished. He pointed out that in that case, payments to the respondent were made out clearly and explicitly in the respondent's name. Whereas here the plaintiff alleged that part payments were made to him without any proof at all. With respect, it must be recalled that Syed Alwi's letter alluded to the two companies as that of the plaintiff and this point was not taken into account by Mr Azra at all. Next, Mr Azra emphasized that in *Wong Hon Leong David v Noorazman bin Adnan* there was cogent evidence before the court there in that there was documentary evidence which went a long way towards proving that it was indeed the respondent who had procured the approval of the application as promised. It must be recalled that the respondent had used the company's letterhead and written to the Menteri Besar seeking for an early approval of the application and the respondent signed that letter as a 'project manager' of the company which eventually saw the Menteri Besar writing the word 'Disokong' addressed to the land administrator and the Menteri Besar then signed below it. Whereas in the present case, Mr Azra submitted that it was through the efforts of the defendant that the Petronas Carigali contract was awarded to the defendant. Mr Azra further submitted that there were no correspondences between the plaintiff and Petronas Carigali pertaining to the contract wherein the latter acknowledged the hard working efforts of the plaintiff in securing the contract for the defendant or for that matter an acknowledgment that pursuant to the hardworking efforts of the plaintiff, Petronas Carigali was awarding the contract to the defendant. Again, with respect, Mr Azra went off-target. He forgot that the defendant had obtained the Petronas Carigali contract vide contract number PCSB-2100 21R and the plaintiff had alluded to this contract number in his letter dated 14 August 1998 that was addressed to Tan Sri Halim Saad (see 'AZJ-I' of encl 5 as reproduced earlier) wherein the plaintiff sought for the continued

payment as promised by the defendant. To confirm that it was really the plaintiff that secured the Petronas Carigali contract for the defendant, Syed Alwi's letter was the best piece of documentary evidence in favour of the plaintiff. Syed Alwi's letter alluded to the plaintiffs letter dated 14 August 1998 that was addressed to Tan Sri Halim Saad which must necessarily refer to the contract number PCSB-2100 21R and in his letter Syed Alwi went straight to the heart of the matter. In his letter, Syed Alwi alluded to:

(1) the two payments which were made to Solid Ballot (M) Sdn Bhd and Grudimas Sdn Bhd amounting to the sum total of RM700,000 and these companies were described as 'your company' — meaning these two companies belonged to the plaintiff;

(2) the fact that the defendant was endeavouring to pay the plaintiff for his 'marketing services in procuring for TL Offshore Sdn Bhd the contract PCSB 2100 21R up to the sum of RM12m, being 1% of the contract sum' showed that the plaintiff was responsible for securing the Petronas Carigali contract for the defendant;

(3) the fact that there were hitches in paying 'the remaining progress payments' and of pertinence would be the assertions that:

> '... in view that the services you have rendered have enabled us to successfully secure the contract and to date, the said contract has been progressing without any hitches.
>
> We will inform you as to when we are ready to effect the remaining payments.
>
> Thank you for your kind understanding.'

must surely show and indeed showed that the plaintiff had expended his exertions in securing the Petronas Carigali contract for the defendant.

Basically, this was a case where the plaintiff had 'delivered the goods', so to speak, borrowing the phrase employed by Gopal Sri Ram JCA in *Wong Hon Leong David v Noorazman bin Adnan* and he should be paid, as promised, by the defendant. In my judgment, the plaintiff was entitled to summary judgment for the balance sum of RM11.3m.

But Mr Azra for the defendant was still adamant. He questioned the authenticity of Syed Alwi's letter and he said that he was raising triable issues in regard to:

(1) the identity of the real maker of that letter; and

(2) the question of ultra vires in that the employee may have acted on his own personal volition without the knowledge of his employer — meaning the defendant.

But alas, Syed Alwi did not affirm an affidavit to assert that he did not write that damning letter. Thus, I must conclude, firstly, that these were not bona fide triable issues and secondly, the plaintiff need not concern himself nor inquire into the regularity of the internal affairs of the defendant company and the plaintiff was entitled to assume that all was being done regularly: *omnia praesumuntur rite ac solemniter esse acta* (*Mahony v East Holyford*

Mining Co (1875) LR 7 HL 869; *Bargate v Shortridge* (1855) 5 HL Cas 297, 318; *Re Land Credit Co of Ireland* (1869) LR 4 Ch 460, 469; *Re County Life Assurance Co* (1870) 5 Ch App 288; and *Duck v Tower Galvanizing Co* [1901] 2 KB 314). To the plaintiff, Syed Alwi was nothing more than an agent of the defendant. To the plaintiff, Syed Alwi held the post of an executive director in the defendant's company. Thus, the plaintiff was entitled to assume, as he did, that all matters of internal management and procedure prescribed by the articles have been complied with. This principle is called the 'indoor management rule' or the 'rule in Turquand's case' (*Royal British Bank v Turquand* (1856) 6 E & B 327). To me, the 'indoor management rule' is eminently practical and should be continued. No business could be carried on if a person dealing with the apparent agents of a company is compelled to call for evidence to show that the internal regulations of the company have been duly observed. The law books are full of authorities on indoor management rule. Suffice for this exercise that I refer to some of them. In *County of Gloucester Bank v Rudry, etc, Co* [1895] 1 Ch 629, a person was dealing with a company and later he obtained from the company a mortgage under seal signed by two directors and the secretary of the company. The articles contained no special provision in regard to the execution of such a document but nevertheless the mortgage had been sealed at a meeting where no quorum was present. The court held that the mortgage was good because the mortgagee had no means of knowing the internal irregularity in the management of the company. In *Duck v Tower Galvanizing Co*, debentures that were issued under the seal of the company were held to be valid even though there had been no meetings or resolutions of the company or the board. In *Mercantile Bank of India v Chartered Bank of India, Australia & China* [1937] 1 All ER 231, the court held that borrowing by agents of the company may effectively bind the company even though the agents borrowed in excess of the actual powers delegated to them.

To the plaintiff, Syed Alwi held the post of an executive director of the defendant company and the plaintiff need not concern himself as to what the powers were that had actually been delegated to Syed Alwi. In my judgment, the plaintiff can safely assume that Syed Alwi has the usual powers of a person in the position of an executive director. Atkin LJ in *Kreditbank Cassel Gmb H v Schenkers Ltd* [1927] 1 KB 826, 844 aptly described the position of a director in these salient words:

> If you are dealing with a director in a matter which normally a director would have power to act for the company you are not obliged to inquire whether or not the formalities required by the articles have been complied with before he exercises that power.

If the defendant could wriggle its way out of the binding agreement with the plaintiff by arguing that there was non-compliance with the internal procedures of the defendant company, then commercial certainty would come to an end. No one would then be willing to transact with our Malaysian company in the belief, albeit wrongly, that the rule in *Turquand*'s case has no application in the Malaysian commercial world. I must send the right signal to the commercial sectors. The indoor management rule is here to stay and

that rule must be vigorously applied in favour of the plaintiff. In the commercial world, people who deal with companies will invariably assume that the agents who appear to be authorized are in fact authorized. In the absence of any melodrama to put the plaintiff on notice, the plaintiff was certainly entitled to rely on the presumption of regularity (*Northside Developments Pty Ltd v Registrar-General* (1990) 93 ALR 385 (High Court of Australia)). There was nothing to alert the plaintiff that all was not well with the defendant company. The plaintiff had kept to his promise by securing the Petronas Carigali contract for the defendant and the defendant must keep its promise to pay RM12m to the plaintiff for the services rendered. A sum of RM700,000 had been paid and the plaintiff was entitled in law and was also entitled by way of a summary judgment to the balance sum of RM11.3m. There were no bona fide triable issues at all in the present case.

With regard to the issue of ultra vires, I must at once state categorically that an act which is beyond the powers of an agent cannot be termed as ultra vires. One must differentiate between agency and capacity — they are distinct from one another. One must also remember that ultra vires should not be confused with illegality. An act is said to be illegal when it is contrary to law or contrary to public policy and in such a situation it is said to be void, but it has nothing to do with the doctrine of ultra vires. An act is said to be void because no action can arise out of an illegal act. It is ideal to recall to mind the speech of Lord Mansfield in *Holman v Johnson* (1775) 1 Cowp 341, 353 where his Lordship in fine language said:

> The principle of public policy is this: *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, then the court says that he has no right to be assisted.

Having said all that, and to avoid future confusion, it is best that the term ultra vires should only be used to denote acts that are really and truly beyond a company's capacity. With respect, the then Federal Court in *Mahima Singh & Ors v Buldev Singh* [1975] 1 MLJ 173 described the breach of the company's articles as being ultra vires. The loose usage of the term ultra vires by the then Federal Court in that case sends the wrong signal to practitioners. It merely adds to the array of confusion. As I endeavoured to explain, an act which is beyond the powers of an agent cannot be termed as ultra vires.

The law may be stated as follows. At common law, an act or a transaction that is ultra vires is said to be void and it will not bind the company (*Ashbury Railway Carriage & Iron Co Ltd v Riche* (1875) LR 7 HL 653 (House of Lords)). An ultra vires act cannot be validated by the unanimous assent of the corporators. An ultra vires act would remain as such. The unanimous assent of the corporators could not validate an ultra vires act and make it binding on the company. It is because of this strict rule, that it is essential to distinguish between a transaction that is ultra vires in the strict sense of the word as opposed to a transaction that is entered into in breach of the directors' duties or for that matter in excess of the agent's

powers. There is a Privy Council case emanating from an appeal from Ontario that proves the point which I am making and would, in the process, assist the plaintiff to a large extent. That would be the case of *Clarkson v Davies* [1923] AC 100, 110, where the Privy Council held that a company could not adopt and approve an act that was merely unauthorized or irregular. Mr Azra employed the term 'ultra vires' to show that the plaintiff as an 'employee may have acted on his own personal volition without the knowledge of his employer — meaning the defendant.' But this begs the question of how the plaintiff could know for certain that Syed Alwi had acted on his own volition without the knowledge of the defendant when he (Syed Alwi) sent that damning letter. Surely the plaintiff was entitled to rely upon the indoor management rule as alluded to above.

In the Malaysian context, there is s 20(1) of the Companies Act 1965 which enacts, inter alia, that no act or purported act of a company shall be invalid by reason only of the fact that the company was without capacity or power to do the act. And according to VC George J (as he then was) in *Bumiputra Merchant Bankers Bhd v Supreme–QBE Insurance Bhd* [1990] 2 MLJ 247, 249:

> The section (referring to s 20(1) of the Companies Act 1965) abolishes the absolute effect of the ultra vires doctrine.

and it is subject to the residual effect as provided in sub-s (2) of s 20 of the Companies Act 1965 which enacts as follows:

> (2) Any such lack of capacity or power may be asserted or relied upon only in —
>
> (a) proceedings against the company by any member of the company or, where the company has issued debentures secured by a floating charge over all or any of the company's property, by the holder of any of those debentures or the trustee for the holders of those debentures to restrain the doing of any act or acts or the conveyance or transfer of any property to or by the company;
>
> (b) any proceedings by the company or by any member of the company against the present or former officers of the company; or
>
> (c) any petition by the Minister to wind up the company.

For the present exercise, it is ideal to reproduce the full text of s 20(1) of the Companies Act 1965 and it is worded as follows:

> (1) No act or purported act of a company (including the entering into of an agreement by the company and including any act done on behalf of a company by an officer or agent of the company under any purported authority, whether express or implied, of the company) and no conveyance or transfer of property, whether real or personal, to or by a company shall be invalid by reason only of the fact that the company was without capacity or power to do the act or to execute or take the conveyance or transfer.

and, in my judgment, it contemplates the situation where an agent of the company may be expressly or impliedly authorized to enter into an ultra vires transaction. To paraphrase s 20(1) of the Companies Act 1965, the scenario would be like this:

> No act ... of a company (including ... any act done on behalf of the company under any purported authority express or implied of the company) ... shall be invalid by reason only of the fact that the company was without capacity or power to do such act ...

and when viewed from this perspective, it shows that a company may give actual authority to an agent to enter into an ultra vires act. In the context of the present case, the defendant gave that authority to Syed Alwi who held the position of an executive director of the defendant's company. In my judgment, by sending that letter, Syed Alwi was not acting ultra vires. Even if the transaction between the parties were ultra vires, which was not the case here, s 20(1) of the Companies Act 1965 provides that it will still be valid and binding on the defendant. At any rate, on the authority of *Hawkesbury Development Co Ltd v Landmark Finance Pty Ltd* (1970) 92 WN (NSW) 199, 217 (Supreme Court of New South Wales) it would be correct to say that once a transaction was fully completed, there was no reason to restrain it. Extending that principle further, I venture to say that once an ultra vires transaction was completed — here the transaction was not ultra vires at all, it was not open to challenge by anyone.

An ultra vires transaction may not be made intra vires even by the unanimous consensus of the members. I reiterate that at common law, the English case of *Ashbury Railway Carriage & Iron Co v Riche* establishes that an ultra vires act cannot be ratified in order to make it binding upon the company. In Malaysia, there is no requirement nor is there a necessity for ratification in order to make an ultra vires transaction binding because such transaction is legally binding by virtue of s 20(1) of the Companies Act 1965.

Mr Azrul for the plaintiff strenuously objected to the issue of ultra vires that was not raised before the learned deputy registrar but now raised before me by way of a submission for the very first time by Mr Azra. Mr Azrul pointed out, quite rightly, that the issue of ultra vires was not raised in any of the affidavits nor set out in the grounds supporting the O 14 application as seen in encl 6 and the O 18 application as seen in encl 14. But by way of a rebuttal, Mr Fadzil for the defendant pointed out that the issue of ultra vires was not raised directly before the learned deputy registrar but rather it was raised indirectly by the plaintiff through the rule in the Turquand's case. On second thoughts, and after reflection, Mr Fadzil agreed that the rule in the Turquand's case was amply alluded to by the plaintiff in his affidavit in encl 12 at para 13 thereto.

Mr Azra for the defendant continued with his submission and he argued that the contract between the parties was tainted in that it was ex facie illegal. Mr Mohd Noor for the plaintiff objected to this line of submission and he pointed out that the issue of illegality was not brought up before the learned deputy registrar. Mr Fadzil, while agreeing that the issue of illegality was not brought up before the learned deputy registrar nor raised in the affidavits, argued that he was entitled to raise the issue of illegality for the very first time before me. I will certainly consider the issue of illegality as raised by the defendant in this judgment (*Mustafa Osman v Lee Chua &*

Anor [1996] 2 MLJ 141 and *Thong Foo Ching & Ors v Shigenori Ono* [1998] 4 MLJ 585). Edgar Joseph Jr SCJ writing for the then Supreme Court in the case of *Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97 emphasized that the appeal to the judge in chambers from the decision of the registrar was by way of a re-hearing and the judge was free to consider the issues that were not raised before the registrar but were raised for the very first time before the judge. I am bound by the decision of the then Supreme Court and this would be the approach to be adopted by me in adjudicating encll 19 and 20. On the issue of illegality, Ismail Khan CJ (Borneo) in *Lo Su Tsoon Timber Depot v Southern Estate Sdn Bhd* [1971] 2 MLJ 161 FC had this to say (see p 163 of the report):

> The point whether the court can take cognizance of a point of illegality, whether pleaded or not, has been the subject of numerous decisions. I need only refer to the case of *Snell v Unity Finance Ltd* [1963] 3 All ER 50 at p 55 where most of the authorities were dealt with. In that case Willmer LJ referred with approval to the propositions set out by Devlin J in *Edler v Auerbach* [1949] 2 All ER 692 who, following the reference to *North-Western Salt Company Ltd v Electrolytic Alkali Company Ltd* [1914-15] All ER 752 said:
>
> > 'That case authorises, I think, four propositions: first, that where a contract is *ex facie* illegal, the court will not enforce it, whether the illegality is pleaded or not; secondly, that where, as here, the contract is not *ex facie* illegal, evidence of extraneous circumstances tending to show that it has an illegal object should not be admitted unless the circumstances relied on are pleaded; thirdly, that where unpleaded facts, which, taken by themselves show an illegal object, have got in evidence (because, perhaps, no objection was raised or because they were adduced for some other purpose), the court should not act on them unless it is satisfied that the whole of the relevant circumstances are before it; but, fourthly, that where the court is satisfied that all the relevant facts are before it and it can see clearly from them that the contract had an illegal object, it may not enforce the contract, whether the facts were pleaded or not.'

In *Snell v Unity Finance Ltd* [1963] 3 All ER 50, the facts may be stated in this way. There, in an action for damages arising out of the condition of a car sold to a purchaser under a hire purchase agreement, the plaintiff hire-purchaser gave evidence, which was accepted by the County Court, that in order to avoid the requirement of a minimum deposit by the Hire Purchase and Credit Sale Agreements (Control) Order 1960, the cash price of the car was stated in the agreement as £210 and the deposit as £50 instead of the true amounts of £185 and £25, which last sum was less than the minimum deposit required by the order. The plaintiff paid in cash only the £25. Illegality of the agreement was not pleaded and was not raised in the County Court, where judgment was handed in favour of the plaintiff. On appeal by the defendant hire-purchase company, it was held that once the facts which made the hire purchase agreement illegal had become apparent to the County Court, it was the court's duty, whether illegality was or was not raised by the parties, to refuse to enforce the hire purchase agreement. The court even went to the extent of holding that it would not allow any limitation on appeals from county courts by reason of the point of illegality

not having been taken below to prevent the court from giving effect to this principle, and accordingly, the court allowed the appeal and dismissed the action. Ismail Khan CJ (Borneo) in *Lo Su Tsoon Timber Depot v Southern Estate Sdn Bhd* rightly said that Snell's case considered quite a lot of authorities on the issue of illegality. That was indeed true. Willmer LJ writing the main judgment for the Court of Appeal in Snell's case referred inter alia, to three main cases, namely:

(1) *Re Mahmoud and Ispahani* [1921] All ER 217; [1921] 2 KB 716;

(2) *North-Western Salt Co Ltd v Electrolytic Alkali Co Ltd* [1914–15] All ER Rep 752; [1914] AC 461; and

(3) *Scott v Brown, Doering, McNab & Co* [1892] 2 QB 724.

Basically, in *Snell*'s case, the English Court of Appeal ruled that the contract in that case was illegal by virtue of the Hire-Purchase and Credit Sale Agreements (Control) Order 1960. But in the present case before me, the contract was not ex facie illegal at all. VC George J (as he then was) aptly remarked in the case of *Sri Kajang Rock Products Sdn Bhd v Mayban Finance Bhd & Ors* [1992] 1 CLJ 204, at p 206 that:

> To constitute a valid contract there must be separate and definite parties thereto; those parties must be in agreement, ie there must be *consensus ad idem*; those parties must intend to create legal relations in the sense that the promises of each side are to be enforceable simply because they are contractual promises and the promises of each party must be supported by consideration.

Indeed, when considering the formation of a contract, one must certainly ascertain the intention to create legal relations and at the same time one must also look at the contents of the contract. Two crucial questions must be posed in the present case:

(1) Was there a contract? The answer would be in the positive — YES.

(2) What were the terms of contract? It was the promise by the plaintiff to secure the Petronas Carigali contract for the defendant and in exchange the defendant made a promise to pay the sum of RM12m to the plaintiff for the services rendered in securing that valuable contract.

Invariably, consideration and an intention to create legal relations are closely interrelated to one another. In *K Murugesu v Nadarajah* [1980] 2 MLJ 82, Chang Min Tat FJ at p 83 of the report aptly remarked that:

> The rule that consideration can consist of mutual promises is now too well established to be questioned.

and the approach of his Lordship was adopted by *Mahmud bin Adam @ Mahmud bin Zuhdi bin Adam v Mat bin Ismail* [1984] 1 CLJ 99 at p 100. His Lordship Gopal Sri Ram JCA in *Wong Hon Leong David v Noorazman bin Adnan* also adopted the same approach. In the context of the present case, I must place emphasis on s 2(d), (e) and (f) of the Contracts Act 1950 and I will reproduce them in succession:

A 2(d) when, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise; (it must be noted that this sub-section was referred to in the case of *Schindler Lifts (M) Sdn Bhd v Sarawak Properties Sdn Bhd* [1992] 3 CLJ 1473 at 1476).

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2(e) every promise and every set of promises, forming the consideration for each other, is an agreement; (this sub-section was also referred to in *Hing Moh Sdn Bhd v Perdana-CMCC Sdn Bhd* [1994] 4 CLJ 128 at 131 to 132).

C 2(f) promises which form the consideration or part of the consideration for each other are called reciprocal promises.

Consideration may be executory and executed. It is executory when the defendant's promise is extended in return for a counter-promise from the plaintiff. It is executed when the promise is made by the defendant in return for the performance of an act by the plaintiff. In the context of the present D case, the defendant had agreed to make a bargain and with that bargain the defendant had to assume liability and in default thereof the defendant had invited the sanction of this court. Reverting back to the case of *Wong Hon Leong David v Noorazman bin Adnan*, Gopal Sri Ram JCA in style explained the law to the facts of that case which must necessarily apply to the present E case. At p 290 to p 291 of the report, his Lordship said:

> The argument based on absence of consideration, in our view, overlooks the fundamental principles governing this area of the law of contract. The facts relevant to the point are these. There was the promise made by the respondent that he would assist in obtaining the required approval for conversion and sub-division of the company's land. The appellant in turn promised, and this is F common ground, that he would pay the respondent RM268,888 for that service. One therefore has in the present case, ab initio, a promise in exchange for a promise. In our judgment, this is good consideration in law. We shall explain momentarily why we hold this opinion.
>
> Now, it is well settled that consideration may be executory or executed. If A agrees to mow B's lawn for RM10 and B agrees to pay RM10 in exchange G for this service, there is, in the eyes of the law, a valid and binding agreement between A and B. This is borne out by the words of s 2(e) of the Contracts Act 1950 which declares: 'every promise and every set of promises, forming the consideration for each other, is an agreement.'
>
> The consideration in such a case is said to be executory, namely, the exchange of the mutual promises. When the lawn is mowed, the act promised H has been done and the consideration is said to have become executed. It is not and has never been the law of this country that to support an agreement, consideration must always be executed. Executory consideration suffices. Of course, A's right to sue for the RM10 may not arise until he has performed his part of the bargain or has been prevented by B from performing it.
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> I The illustration we have given and the principle we have stated are so elementary that they may be found in any standard work upon the subject. But we have been compelled to do so because a reading of the judge's note of the proceedings in the court below has left us with the distinct impression that

these elementary propositions may have been misunderstood by the appellant and by the court.

The submission that the respondent did nothing to earn his fee is equally unmeritorious. To recall, upon the facts in respect of which the appellant raises no dispute, the respondent did expend his exertions in securing the Menteri Besar's support for the company's application. The approval, much sought after by the appellant and the company, was obtained. In the words of counsel for the appellant when he addressed us on this point, 'the respondent delivered the goods'. In the light of this telling concession, it is an amazement that the appellant is able to submit that the respondent did nothing to earn his fee.

The actions of the respondent come well within the terms of s 2(d) of the Contracts Act 1950 which reads as follows:

> 'when, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise'.

The position of the respondent before us is, at the very least, not dissimilar from that of the successful plaintiff in *Lampleigh v Brathwait* (1615) Hob 105, who in order to obtain a pardon for the defendant, Brathwait, at the latter's request, exerted himself 'riding and journeying to and from London and Newmarket' at his own expense. Brathwait later promised to pay him 100 pounds for his trouble, but failed to do so. Lampleigh sued in assumpsit and succeeded on the ground that his services had been rendered at the previous request. If Lampleigh could recover for his exertions, it is a little difficult to understand why the instant respondent should not.

At the end of the day, it is essentially a question of fact whether a binding contract is in existence (*Lau Sieng Nguong v Hap Shing Co Ltd* [1969] 1 MLJ 190, FC; *Lau Brothers & Co v China Pacific Navigation Co Ltd* [1965] 1 MLJ 1; *Keppel Shipyard (Pte) Ltd v Monvia Motorship Corporation* [1980] 2 MLJ 169; *Quek Choon Huat v RM Scow & Anor* [1981] 2 MLJ 3 (Court of Appeal, Singapore); and *Ng Brothers Construction v Kaolin (Malaysia) Sdn Bhd* [1985] 1 MLJ 245 — of course, these cases are factually different from the present case but the principles enunciated in these cases are germane and should be emphasized). In the context of the present case, there was no necessity to proceed to trial. The statement of claim as it stood showed the existence of a valid and binding contract between the parties and the defendant's application to strike out the plaintiff's writ of summons together with the statement of claim under O 18 of the RHC was rightly dismissed by the learned deputy registrar. On the facts as it stood, the learned deputy registrar was also correct when she allowed the plaintiff's application for summary judgment under O 14 of the RHC.

In my judgment, the facts in the present case merit an O 14 application. In *Tac Construction & Trading v Bennes Engineering Bhd* [1999] 2 CLJ 117, the law on O 14 was lucidly set out. There the court said:

> The law journals are replete with authorities on summary judgments. Suffice for this exercise that reference to some of them are made here. Thus, in an Order 14 application the defendant need only raise one triable issue acceptable to the court to enable him to defend the suit (*Amanah Merchant*

Bank v Lim Tow Seng & Ors [1993] 2 CLJ 635, [1993] 2 MLJ 241). It is said that an Order 14 application cannot be granted where the defence raises a plausible dispute (*Avel Consultant Sdn Bhd & Anor v Mohamed Zain Yusof & Ors* [1985] 2 CLJ 11, [1985] 2 MLJ 209). But where the facts are clear and undisputed and, the only issue raised is a question of law, it is proper that it be dealt with in an Order 14 application (*American Express Sdn Bhd v Dato Wong Kee Tat & Ors* [1990] 1 CLJ 17; [1990] 1 MLJ 91). It is now trite law that an Order 14 application is to enable a plaintiff to obtain a summary judgment without trial provided:

(1) the plaintiff can prove his claim clearly; and

(2) the defendant is unable to set up a bona fide defence or raise an issue against the claim which ought to be tried.

The Judge must not only be satisfied that there is no defence but must also be satisfied that there is no fairly arguable point to be argued on behalf of the defendant and having so satisfied himself on these points, it is the Judge's duty to give judgment to the plaintiff. I am of the considered view that there would be a fairly arguable point to be argued if the defence can raise serious questions of law or fact to resist the plaintiff's claim or it is apparent to the court, though the defence is not able to pinpoint any precise issue or question in dispute which ought to be tried, that for some reason there ought to be a trial. Mohamed Dzaiddin J (now FCJ) in *Syarikat Kerjasama Serbaguna Tunas Muda Sungai Ara v Ghazali bin Ibrahim* [1985] 2 MLJ 225, had this to say of summary judgment at p 226 of the report:

> 'The issue here is whether or not there is a triable defence. This simply means that it is for the Defendant to show on merits, he has a good defence to the claim, or that a difficult point of law is involved, or the dispute is as to the fact which is to be tried or any other circumstances showing reasonable grounds of a bonafide defence (See: *The Supreme Court Practice 1985 Vol 1 — 'Defence showing cause'* at p 137).'

Further down the same page of the same judgment, his Lordship Mohamed Dzaiddin J (now FCJ) said:

> 'However, in my opinion, this is essentially a case where the triability of the issue depends upon evidence as opposed to law. The facts and circumstances as deposed and found in the affidavits filed therein are sufficient to settle the issue. I would adopt the statement in the judgment of Ackner LJ in *Banque de Paris v de Naray* [1984] 1 Lloyd's Rep 23 to the following effect:
>
> > 'It is of course trite law that Order 14 proceedings are not decided by weighing the two affidavits. It is also trite that the mere assertion in an affidavit of a given situation which is to be the basis of a defence does not, ipso facto, provide leave to defend; the Court must look at the whole situation and ask itself whether the defendant has satisfied the Court that there is a fair or reasonable probability of the defendant's having a real or bonafide defence.'
>
> Thus, from the facts and circumstances of the case as a whole, I am satisfied that the Defendant has failed to show a bona fide defence to the claim. Therefore, I make an order in terms of Prayers 1, 3 and 4 of this application.'

I too, on the facts was satisfied that the defendant in the present case had failed to show a bona fide defence to the claim.

I did say that I would consider the issue of illegality in this judgment. I will do so now. An argument was advanced on behalf of the defendant to the effect that the pleadings and the affidavits showed that there was an illegal activity where the plaintiff — a third party — was alleged to be able to influence Petronas Carigali in awarding the contract to the defendant. In refined language it was submitted that the contract envisaged a situation where the plaintiff as a third party was able to influence the private, confidential as well as the internal machinery of a national oil company in the award of a multi-million ringgit contract irrespective of and notwithstanding the existence of other more competitive and deserving bidders and notwithstanding the fact that the set or strict tender of award procedures adopted by the national oil company made it bound to observe the procedures strictly and was bound to award the contract to other more competitive and deserving bidders.

I was referred to a book entitled '*Procurement Law for Construction and Engineering Works and Services*' by RW Craig and it was pointed out that the authorities found in the said book went a long way to show the integrity of maintaining the tendering process in order to ensure fair dealings amongst its bidders. At p 279 to p 284, the book by RW Craig carries the following materials:

> 6.13 Evaluation of tenders. Good faith and fairness in contracting. Damages for breach of tendering contract includes loss of profit.
>
> *Health Care Developers Inc and Others v The Queen in Right of Newfoundland* (The Crown) ((1966) 136 DLR (4th) 609, Newfoundland Court of Appeal, June 4 1996, in part affirming Orsborn J (1995) 20 CLR (2d) 203; 128 Nfld & PEIR 181; 400 APR 181; 54 ACWS (3d) 256 (Nfld TD). For the first instance decision see also Canadian Current Law, [1995] Case Law Digests 9129 (November 1995)).
>
> **Scenario** Tenders were invited by the Government of Newfoundland and Labrador for the design, construction and leaseback of health care facilities. The government owned the site; it would be leased to the developer and leased back to the government for a period of 30 years on completion of the development. After 30 years, the facilities would revert to the government. Tender documents included statements of functional requirements, preliminary plans and outline specifications for the various required facilities, but no detailed architectural or engineering drawings or specifications. The invitation asked for irrevocable proposals to design, build and lease the required facilities to the government for a period of 30 years, with an option to purchase for a nominal payment at the end of this period. The tender forms also required annual rentals to be stated and prices at which the purchase options might be exercised at the end of 10 and 20 years. Developers were to provide a 10 year warranty on the exterior envelope of the building.
>
> Included among the tender documents was the ubiquitous 'privilege clause'. The Government reserved 'the right to accept or reject any or all of the proposals received' and that decision was to be final and at the sole discretion of the Government (Article 2.2 at

(1996) 136 DLR (4th) 609, 615). They would 'not necessarily accept the lowest or any of the Tender Proposals' (Article 8.1).

Seven tenders were received, including tenders from Health Care, Dobbin and Trans City. Dobbin was lowest bidder (ie required lowest annual rent) on two sites. Health Care was lowest on one site. Officials decided that the schemes put forward by Dobbin and Trans City would need extensive redesign. Health Care became 'preferred bidder' (The term 'preferred bidder' is used in the Public Tender Act RSC 1990) for all three sites. Its schemes provided a 'design, structure and layout [which] met the minimum code and engineering standards, and complied with the functional program' ((1996) 136 DLR (4th) 609 per Cameron JA at 616d (A 'functional program' is a detailed written description of a facility and services to be provided. It includes: specific space, staff and equipment requirements and functional and operating relationships) (at 616c)).

This was not a 'standard' tender evaluation, but a tender evaluation made on the basis of 'best overall proposal'. The difficult question was: which proposal offered the highest standard of construction whilst satisfying the demands of the functional programs? To answer this question each proposal was examined against criteria developed by the government but which had not been published in the invitation to tender or the tender documents.

The 'preferred' design solution was a 'non-combustible type structure using brick cladding and steel' (Ibid, at 616f. This was no doubt due to the fact that extensive design for steel and masonry structures had previously been commissioned at a cost to the Government of about $400,000 (at 613c) prior to the decision to invite tenders on a 'design/build/lease' basis). Only two tenderers offered such a design proposal, Trans City and one other. A committee of four government ministers controlled the evaluation and award process and recommended that Trans City's bids be accepted. Cabinet accepted this recommendation provided that its financing costs were not more than the province's borrowing rate. Cabinet authorized the award of the contract to Trans City as an exception under s 8 of the Public Tender Act but there was never any evidence of confirmation on the interest rate point.

The Tender Act did not expressly require the government to award a contract to the preferred bidder. But it seemed clear to the trial judge that, taking the legislation as a whole and whilst maintaining the integrity of the public tendering system, it was the intention of the Act that public tenders should be awarded to the preferred bidder, unless s 8(1) was applied. Under that section, when it did not appear 'expedient' to award the contract to the preferred bidder, the Cabinet might authorize rejection of the preferred bid and the award of the contract to another bidder. Under this provision, a decision was made not to award the contracts to Health Care, but to award the contracts to Trans City.

Health Care and Dobbin commenced actions against the government claiming that in awarding the contract to Trans City, they had breached obligations founded both in contract and in legislation. The actions were not consolidated but heard together. The trial judge held in favour of Health Care and Dobbin and

awarded damages based on lost profits to Health Care, but only nominal damages of $1 to Dobbin. Claims for exemplary damages by both plaintiffs were denied, as were claims for costs on a solicitor and client basis (These issues are not discussed here). The government appealed the finding of liability against it, Health Care appealed the denial of exemplary damages and costs as claimed, Dobbin appealed against not being found to be preferred bidder, not being awarded either lost profits or wasted tendering costs, not being awarded exemplary damages against the government and the denial of its costs on a solicitor and client basis. In the words of the Court of Appeal, the 'story is somewhat unusual' ((1996) 136 DLR (4th) 609, at 611f).

In the discussion on this case which follows the terms *owner*, the *Crown* and the *government* are used to denote the person inviting tenders.

Question (1) What is the relationship between owners and bidders during the bidding process?

Response The Newfoundland Court of Appeal was faced with this problem in *Health Care Developers Inc & Ors v The Queen in Right of Newfoundland (the Crown)*. There is a relationship in contract which exists during the bidding process.

The leading case on this point is the decision of the Supreme Court of Canada in the case of *The Queen v Ron Engineering & Construction (Eastern) Ltd* ((1981) 119 DLR (3d) 267; [1981] 1 SCR 111 (SCC) discussed at s 6.2) where the court analysed the relationship between owner and tenderer on the basis of two separate contracts. Contract A (later described as the 'tendering contract' by Vertes JA in Martselos (*Martselos Services Ltd v Arctic College* (1994) 111 DLR (4th) 65 per Vertes JA at 70f. Leave to appeal to SCC)) is a unilateral contract brought into life by the submission of a tender in accordance with the owner's stipulations. This contract results from the tenderer's act in response to the owner's offer. Contract B comes into existence when the tender is accepted. In this analysis contract B is the construction contract sought by each of the tenderers.

Question (2) What obligations arise under this tendering contract?

Response There is an obligation placed on the owner to act fairly towards all tenderers. Certain good practice principles have evolved. This fairness obligation can be seen as a duty imposed on the owner to conduct the bidding process in good faith, or it can be treated as an implied term of the tendering contract. English courts are reluctant to talk in terms of 'good faith' but Canadian, Australian and USA courts are increasingly doing so (It was said that in England there is no general doctrine of good faith: *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433 at 439 (CA). But a duty of fairness was imposed on the owner in the Blackpool case, discussed at section 6.7).

The *Ron Engineering* case established the existence of the tendering contract, and dealt with the issue of whether the offer was irrevocable. This dispute (*Health Care*) concerned the obligations of the owner under the tendering contract. Cameron JA observed:

A '... In cases which have considered the position of the owner under contract A [the tendering contract], the courts have struggled with reconciling freedom of contract and the notion of fairness. Some of these cases are difficult to harmonize... .
It is, however, possible to discern certain generally accepted principles from the cases decided since Ron Engineering... .

B '.... upon contract A [the tendering contract] coming into being:

(a) There arise at law rights and obligations of the parties that are consistent with the protection and promotion of the integrity of the bidding system where under the law of contracts it is possible to do so.

(b) The owner owes a general duty to treat all bidders fairly.

C (c) An owner has the right to include in the tender documents stipulations and restrictions on the rights of bidders and to reserve privileges to the owner.

(d) An owner does not have the right on consideration of competing bids to rely upon undisclosed terms and conditions.

(e) 'Lowest or any tender not necessarily accepted' reserves conditionally to D the owner the privilege to decide not to proceed with the work at all, but does not allow the owner to: (i) choose comparatively among the bidders based on criteria that has not been disclosed to the bidders; or (ii) to award to another bidder or another person something other than contract B.

(f) General custom in bidding, and particular local customs, can result in E implied contractual rights.

(g) An owner does not have the right to pass over properly filed bids and enter into contract B with a bidder whose bid is informal, or invalid.

(h) Where there is a breach of contract A [the tendering contract], the measure of damages can include (i) the cost of preparation of the bid; and (ii) upon the low bidder proving he would have obtained the contract, the F estimated loss of profit on the work.' (Cameron JA and the trial judge adopted the words of Jenkins J of the Prince Edward Island Supreme Court in *Murphy v Alberton (Town)* (1994) 114 Nfld & PEIR 34).

... In general, many of these principles are directed toward what I described in *Power Agencies Co v Newfoundland Hospital and Nursing Home* G *Assn.* ((1991) 90 Nfld & PEIR 64 (Nfld). SC) as fairness in contracting. This might more properly be viewed in the context of the emerging obligation of contracting parties to perform in good faith, in this case the obligation of the Government to perform its duties under contract A [the tendering contract] in good faith.

Good faith is clearly a part of contractual relationships under the H Quebec Civil Code: *National Bank of Canada v Soucisse* ([1981] 2 SCR 339 (SCO) and *Canadian National Bank v Houle* ([1990] 3 SCR 122, 74 DLR (4th) 577 (SCC)) It has also been imposed under the common law on parties to a contract who are in a position to exercise a discretion: *Gateway Realty Ltd v Arton Holdings Ltd* ((1991) 106 NSR (2d) 180 (NSSC)) affirmed (1992) 112 NSR (2d) 180 (NSCA)). In Ron I Engineering, Estey J said, the 'integrity of the bidding system must be protected where under the law of contracts it is possible so to do' ([1981] 1 SCR 111 at 121 (SCC)). Examples of cases where 'good faith' has been required of Governments in tendering are *Thomas C Assaly Corp Ltd v*

Canada ((1990) 44 Admin LR 89 (FCTD)) and *Marteselos Services Ltd v Artic College*' (1992) 5 BLR (2d) 204 (NWTSC) reversed on other grounds (1994) 111 DLR (4th) 65 (NWTCA). A

The decision in Assaly involved a denial of procedural fairness and should be equated with the owner in a tendering contract dispute being denied the right to evaluate tenders on undisclosed tender evaluation criteria. Cameron JA considered the basis on which terms are implied in a contract, concluding that B in this context a term would be implied when it was necessary to the fair functioning of the agreement. The Crown conceded that the owner was under an obligation to treat tenderers fairly and that an undisclosed preference would constitute unfair treatment. Cameron JA continued:

'Here, the conduct which [the trial judge] found to be breach of contract A [the tendering contract] was the failure of the Crown to reject certain C tenders and the awarding of something other than contract B. This conduct also falls into the category of unfair treatment by an owner. I would agree with the comment of Sue Arrowsmith: (In (1988) Government Procurement and Judicial Review Scarborough, Ont. Carswell at p 99).

> 'Another practice required by the fair treatment concept is that of D rejecting bids which are not responsive to the specifications, or do not comply with other mandatory requirements of the tender call. If this is not done other bidders may be unfairly prejudiced by their own reliance on the terms as originally set out.'

...The doctrine of good faith is applicable in this case. While one can logically conclude that good faith performance of contractual obligations E should be imposed on all contracts, the necessity for its application to Government tendering to 'protect the integrity 'of the bidding system' was expressed in *Kencor (Kencor Holdings Ltd v Saskatchewan* [1991] 6 WWR 717 (Sask QB), discussed at s 6.16) and I need not state the principle more broadly than that it is a part of the law of tendering for Government contracts. As to the standard of conduct demanded by good F faith, at a minimum, it would require that a party not act in bad faith. In my view, it would be acting in bad faith to award something other than contract B, to fail to reject tenders not in compliance with the call or to award contract B on the basis of an undisclosed preference.

Even if I were wrong about the application of the doctrine of good faith, the obligation to act fairly may be implied as a term.' (136 DLR G (4th) 609 per Cameron JA at 625h-627d).

Question (3) Is it possible to impose an obligation on the owner to act fairly when there are express terms of the tendering contract which provide powers which if exercised would be in conflict with such an obligation?

Response Yes. Such an obligation is necessary to ensure that 'every one is H bidding on the same contract and that there are no hidden preferences' (Ibid, at 627g). It would require very clear and specific words to contract out of the fairness obligation. The privilege clause does not amount to such an opt out.

It was argued by the Crown that the general nature of the tender I invitation and the privilege clause permitted it to award the contract to Trans City. It had been clear to all tenderers that the lowest tender need not be accepted; that this was a 'best proposal' contest

where a subjective evaluation would be made by government officials. But even if the contest was a 'wide open crap shoot' (The description of the tendering process by one witness: see 136 DLR (4th) 627g), it would not permit unfair treatment of tenderers. Cameron JA said:

> 'Even if that were true, it does not permit unfair treatment of bidders. The whole point of requiring fair treatment is to ensure that everyone is bidding on the same contract and that there are no hidden preferences. Even if the Crown were correct, that for qualified bidders the assessment was a subjective one, the Crown as owner was still obligated to reject improper tenders and prohibited from entering into anything other than the contract B anticipated by the call.
>
> The privilege clauses raise the issue of whether one can contract out the application of fairness or good faith. The cases, consistent with freedom of contract, would appear to acknowledge that one can. However, to contract out of good faith, and to agree that one can be as unreasonable as one wishes in the performance of a contract would require an opting out clause that is 'precise, specific, not antithetical to the entire purpose or intent of the remainder of the contract and is not unconscionable or contrary to public policy.' (Refer to Shannon Kathleen O'Byme (1995) *Good faith in contractui performance: recent developments* 74 Can Bar Rev 70 at 96, cited by Cameron JA at 136 DLR (4th) 628b).

It was not that the Crown here claimed a right to treat tenderers unfairly, but that it was inappropriate to imply a term that ran counter to an express term such as the privilege clause. This clause was not a charter to permit the Crown to treat bidders unfairly nor did it permit breach of a duty to perform contractual obligations in good faith. Privilege clauses, or 'rejection clauses' were considered by Stone JA in *Northeast Marine Services Ltd v Atlantic Pilotage Authority* ((1995) 179 NR 17 (FCA)). He stated:

> 'I am of the view for the reasons which I have already expressed for imposing an obligation of fair treatment, that the rejection clause was not intended to operate so as to nullify that obligation. If it were otherwise the obligation would fail to fulfil its true role of preserving the integrity of the tendering process by preventing the awarding of contract B on a basis other than as set forth in the tendering documents upon which contract A was based.' ((1995) 179 NR 17 per Stone JA at 39 (FCA), cited by Cameron JA at 136 (DLR (4th 628g).

For the Crown to grant other than contract B and to fail to reject tenders which did not comply with the tender invitation were breaches of contract in common law without reference to legislation.' (136 DLR (4th) 609 per Cameron JA at 628e–h. Reference is to the Newfoundland Public Tender Act 1990).

and at pp 289–291 of the same book, the following write-ups appear:

Comment Perhaps the most instructive aspect of this judgment outside of Newfoundland is the emphatic demand of the court that fairness must prevail in the bidding process. What is the point of fairness? It

is so that everyone is bidding on the same contract and there are no hidden preferences (Ibid at 627g). The duty to be fair is discussed in terms of an implied term or a general duty of good faith. The court referred to 'the emerging obligation of contracting parties to perform in good faith' (Ibid at 623g). *Martselos* (1994) 111 DLR (4th) 65) was a 'good faith' case (136 (4th) 609, at 624a). In England it is said there is no general doctrine of good faith' (Ibid 625 b-c, Cameron JA citing ... *Interfoto Picture Library v Stiletto Visual Programme Ltd* [1989] QB 433; [1988] 1 All ER 348 (CA) per Bingham LJ at 352-3, noted post). But 'even in English law good faith is an important factor in its process of interpretation of contracts' (Ibid 625 c-d). In Canada 'good faith' is part of the law of tendering for government contracts. As a minimum this means not acting in bad faith (136 DLR (4th) 609 per Cameron JA at 627c). But what would be considered bad faith? To award something other than contract B, failing to reject non-conforming tenders, or awarding contract B on undisclosed criteria: these are examples of the owner acting in bad faith. Even if there is no good faith doctrine to be applied, a term may be implied to the tendering contract obliging the owner to act fairly. Any clause purporting to opt out of the fairness duty would have to be quite clear and specific (Ibid at 628a) and there was no such clause in the *Health Care* case.

It has been said that there is no general doctrine of good faith in English law. Reference was made to Bingham LJ in the *Interfoto Picture Library* case. He said ([1989] QB 433; [1988] 1 All ER 348, at pp 352–353 (CA):

> 'In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts parties should act in good faith. This does not simply mean that they should not deceive each other, a principle which any legal system must recognize, its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as 'playing fair', 'coming clean' or 'putting one's cards face upwards on the table'. It is in essence a principle of fair and open dealing. In such a forum it might, I think, be held on the facts of this case that the plaintiffs were under a duty in all fairness to draw the defendants' attention specifically to the high price payable if the transparencies were not returned in time and, when the 14 days had expired, to point out to the defendants the high cost of continued failure to return them.
>
> English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness. Many examples could be given. Thus equity has intervened to strike down unconscionable bargains. Parliament has stepped in to regulate the imposition of exemption clauses and the form of certain hire-purchase agreements. The common law also has made its contribution, by holding that certain classes of contract require the utmost good faith, by treating as irrecoverable what purport to be agreed estimates of damage but are in truth a disguised penalty for breach, and in many other ways.'

It is submitted that the common law, including English law, has used principles of good faith and fair dealing in deciding the merits of cases in the context of tendering (See discussion on *William Lacey* etc at s 5.2.).

A number of 'good practice' points emerge of the good faith or fairness duty. Bids must be rejected which do not comply with the tender call. If this is not done other bidders are like to be prejudiced by relying on the tender call stipulations. In this case it was an express term of the tendering contract that tenders containing qualifications would be rejected (136 DLR (4th) 609 per Cameron JA at 626b). Cameron JA observed that in Kencor it was said to be 'imperative that the low, qualified bidder succeed.' (Ibid at 626f. Cameron JA quoted the judgment of Halvorson J in *Kencor Holdings Ltd v Saskatchewan* [1991] 6 WWR 717, 721, discussed at 6.16.).

The so-called privilege clause is common to Canada and England, although that label does not appear to be in common use in the latter country. The exact words used vary, but the general purpose of the words is to prevent the creation of any owner's duty to award a contract to the lowest bidder, or to award any contract at all. But the privilege clause is not designed to negate the owner's duty of fairness to all tenderers (Ibid at 628e-g. Cameron JA referred to Stone JA's dissenting judgment in *Northeast Marine Services Ltd v Atlantic Pilotage Authority* (1995) 179 NR 17, 39).

The privilege clause does not suspend any statutory provision, or term of the tendering contract. The lack of any obligation to award any contract does not permit the owner to award contracts on other than the disclosed award criteria. But if statutory or other provisions do oblige the owner to award the contract to the 'preferred bidder', no privilege clause can change the effect of that provision (Ibid at 620).

The *Health Care* case also raised matters of finance. The case arose at the time when the economy was in recession. There was political pressure to generate construction activity. Could public sector building work be commenced without adversely affecting the current national budget? Lease financing rather than traditional capital account borrowing would have the effect of building today and paying tomorrow. Ministers reported no real advantage: the government should not enter into financing deals which were more costly than the cost of its capital market issues (Ibid at 612). Lease financing would only be attractive if interest savings were available. The tender evaluation group recommended acceptance of Trans City's bid. The Cabinet accepted this but added that financing costs must be equal to or less than the government's normal range of borrowing rates, although the financing cost of the Trans City bid on an annual rental basis was higher than the prevailing borrowing rate.

As regards the difficulty of evaluating bids, it is clear that projects originally destined for a build/lease tender invitation suddenly became design/build/lease projects (Ibid at 613g). This change was caused by political pressure to advance the projects' progress in order to stimulate construction work in time of recession. The

invitation to tender was published before commissioned design work was completed. The difficulty of evaluating bids when there was no design specification or settled design evaluation criteria had been realised by the officials (Ibid at 613h) but this did not deter the politicians in their pursuit of early tenders. Cameron JA acknowledged the difficulty too: this difficulty 'did not preclude using the public tendering system; it merely made the application of the law more difficult' (Ibid at 619e). It seems clear that the tender invitation and documents here were deficient in not staling design evaluation criteria, that is that a 'non combustible type structure using brick cladding and steel' was required (Ibid at 616f).

Where the call for tenders does involve tenderers' design proposals, it is inevitable that some judgment has to be made by the tender assessors. The bids could not be rejected for minor departures from stated requirements. But those bids which misinterpret the owner's requirements and which would require substantial re-design should be rejected. 'Substantial compliance with the conditions of the tender call is the test' (Ibid at 629h. Cameron JA referred to *British Columbia v SCI Engineers & Constructors Inc* (1993) 22 BCAC 89).

Finally, it would be bad faith if the owner awarded other than contract B. In other words, the owner is in breach of its fairness or good faith obligation to award a contract, the requirements of which bear little resemblance to the tender specification or functional programme. The trial judge identified eight major variations between the contract award to Trans City and the original tender call (Ibid at 617h). The contract awarded was materially different from that which was tendered for' (Ibid at 629a-c).

At p 302 of the same book, the learned author refers to the case of *Kencor Holdings Ltd v Government of Saskatchewan* (1991) 6 WWR 717, Saskatchewan QB, Halvorson J 19 September 1991, where the following passage appears:

> In any event, I agree with the [Kencor's] analysis. To maintain the integrity of the tendering process it is imperative that the low, qualified bidder succeed. This is especially true in the public sector. If governments meddle in the process and deviate from the industry custom of accepting the low bid, competition will wane. The inevitable consequence will be higher costs to the taxpayer. Moreover, when governments, for reasons of patronage or otherwise, apply criteria unknown to the bidders, great injustice follows. Bidders, doomed in advance by secret standards will waste large sums preparing futile bids. The plaintiff here, for example, spent $23,000 on its abortive tender.

Continuing further, at p 583 of the same book, the learned author states:

> Fletcher J dissented from the majority view that JC's bid was unfairly rejected. His judgment represents a practical and robust approach to dealing with late tenders, which will appeal to many practitioners, but which did not appeal to the majority on this bench. He said:
>
> > 'Statutes requiring the letting of contracts to the lowest bidder are designed for the benefit and protection of the public, and not that of the bidders.' Consequently, in resolving the issues presented in a case such

A as this, the lodestar is the interest of the public and not that of an aggrieved, unsuccessful bidder.

The letting of public works contracts through a competitive bidding process has essentially two objectives: First, it is intended to ensure that public works projects will be constructed by a qualified or responsible bidder at the lowest possible price; and, second, it is intended to ensure B that government agencies and contractors do not engage in fraud, collusion, or corruption in the letting of public contracts.

Consequently, Georgia cases have held that after a government agency has solicited competitive bids for a public works project, it cannot make material changes in the plans and specifications without renewed notice to prospective bidders. Georgia cases have also held that the C government agency is vested with discretion in determining whether the lowest bidder is qualified or responsible'.

Finally, at pp 845–847, the following passages appear in the same book:

14.15 Collusive tendering in the UK

D Collusive tendering is operated by tenderers who agree to distort competition by collaborating in their responses to invitations to tender. The size of contracts to be won and the low margins between profit and loss are strong incentives for collusive tendering within the construction and engineering industries.

From a tenderer's point of view, collusive tendering might lead to higher E prices being charged, and by restricting the number of tenders submitted, lower overheads. It is also possible for a tenderer to demonstrate a competitive desire to win new orders whilst secure in the knowledge that its tender will not be accepted because by agreement another tenderer will submit a lower offer. This practice might be successful in keeping an uncompetitive tenderer on an owner's standing list of tenderers. Collusive tendering may also act as a barrier F to new entrants to the market. A contractor may be able to continue its business relationship with an existing customer without concern that it will be undercut by more aggressive competitors.

At its most basic level, collusive tendering may be no more than agreement to quote identical prices in the hope that each tenderer will participate in the market. But a market of consistent and constant prices will G not go unnoticed by customers and regulators. A more sophisticated approach may be needed to avoid detection, but will be more expensive to operate. Collusive tenderers might appoint one person to co-ordinate the submission of all tenders in response to an invitation. Each tender has its turn to be 'successful'. All other tenders are marked up accordingly to ensure the desired success eventuates. Or the collusive tenderers work through a trade association which administers 'success'.

H

At a more sophisticated level, the collusive tenderers appoint one of their number to act as an assessor. That person is informed early of all proposed tenders in response to an invitation. An assessment of project cost and market price is made, and any unfavourable tenders discarded, so that only the higher, and economically sound, offers reach the owner. It could of course be I argued from industry's point of view that such a filtering out of uneconomic tenders would be no bad thing for the health of that industry. It could be argued that this process is just what responsible owners do (or should do) anyway. But the fact that this process is organized by industry to distort

competition probably makes it illegal and subject to sanction within most jurisdictions.

Collusive tendering is caught by the Restrictive Trade Practices Act 1976 under the laws of the United Kingdom. The Act is sufficiently wide to include such collusion whatever form it takes: price fixing is clearly caught by s 6(1)(a). An agreement amongst a group of tenderers whereby no tender is submitted prior to a group discussion on pricing is also caught. Section 6(1) is not merely confined to the level of prices but applies to a decision to submit or withhold a price. Section 6(1)(f) catches an agreement not to submit a tender to a person or class of persons. A person harmed by collusive tendering may commence an action for damages under s 35(2), but problems as to causation and quantum will be formidable obstacles.

14.16 Collusive tendering in New South Wales.

In 1991 the Royal Commission into Productivity in the Building Industry in New South Wales inquired into:

1 The nature, extent and effects of practices and conduct in and in relation to the building industry which may significantly affect efficiency and productivity within that industry;

2 The nature, extent and effects of illegal activities that occur in or in relation to, the building industry in New South Wales including (but not limited to):

(a) intimidation and violence;
(b) secret commissions;
(c) extortion; and
(d) other corrupt conduct.

3 Whether, in view of our findings in relation the matters set out in paragraphs one and two, there are any measures (including legislative and administrative changes) which should be made to increase productivity or efficiency within the building industry or to deter illegal activities in, or in relation to, that industry.

It was further clarified that part of the inquiry would 'include references to practices, conduct or activities in or in relation to tendering for civil construction contracts'. Commissioner Holland QC was specifically asked to look into allegations of collusive tendering. The matters referred to him were:

> 'The existence of collusive conduct and practices in or in relation to tendering for building contracts in New South Wales from 1 January 1986 to date and continuing'.

Subsequently the reference was extended to civil construction contracts.

In attempting to tie up the issue of illegality with the tender procedures adopted by Petronas Carigali, the defendant was saying that the plaintiff had illegally influenced Petronas Carigali to award that contract to the defendant. The defendant also seemed to say that if Petronas Carigali were to strictly adhere to tender procedures, other more competitive and deserving bidders would secure the contract. I wonder whether the defendant was most unhappy at being awarded the Petronas Carigali contract worth RM2,107,103,013? Or was the defendant happy at being awarded the Petronas Carigali contract but was most unhappy at the prospect of having to pay the plaintiff for his services rendered in securing that contract? Was the defendant trying to wriggle its way out of its own

promise to pay the plaintiff the sum of RM12m as promised? If the defendant had secured the Petronas Carigali contract on its own initiative — on its own steam, so to speak — why then did the defendant pay RM700,000 to two companies belonging to the plaintiff and agree to pay the balance sum of RM11.3m as alluded to by Syed Alwi in his damning letter? It was part and parcel of my judgment that the two companies, namely, Solid Ballot (M) Sdn Bhd and Grudimas Sdn Bhd were owned by the plaintiff and no one else and this too can be seen in Syed Alwi's letter. There was nothing illegal nor sinister about the whole transaction. The plaintiff was asked to secure the Petronas Carigali contract and he agreed to help. The defendant promised to give 1% of the value of the contract limited to RM12m if the plaintiff succeeded. The plaintiff rendered his services and succeeded in securing the Petronas Carigali contract for the defendant. The plaintiff received part-payment and expected to be paid the balance sum of RM11.3m. Arising out of this simple transaction, one question arises: where was the illegality which the plaintiff had committed?

The passages on tender procedures that appeared in RW Craig's book were in relation to the challenges advanced by unsuccessful bidders against the tender bodies that granted the tenders to the successful bidders. Here before me the facts were entirely different. The plaintiff was not challenging the grant of the Petronas Carigali contract to the defendant. Neither was the defendant interested in surrendering and revoking the Petronas Carigali contract and calling for fresh tender exercises so that other more deserving tenderers would be granted that contract. This was a case where the plaintiff was suing the defendant on the promise to pay RM12m for securing the Petronas Carigali contract. This was a case where the defendant, having obtained the coveted Petronas Carigali contract, refused to keep its end of the bargain. I reiterate that there was nothing sinister about the whole transaction. There was no illegality at all. The defendant was merely stirring a storm in a teacup. These were my judgments and I so hold accordingly.

But Mr Azra launched a concerted attack. He submitted that the fact that the plaintiff had held himself out as having the ability to influence a national oil company to award contracts to any bidder, not necessarily the defendant, meant that the plaintiff's services had the effect of influencing the integrity of the tendering process. He submitted that paras 3, 5 and 6 of the statement of claim showed the usage of tendering processes. But with respect, these paragraphs were silent on this point. Be that as it may, in regard to the tendering process, reliance was placed by the defendant on the case of *Fairclough Building Ltd v Port Talbot Borough Council* (1992) 33 Com LR 24, where the plaintiff who was initially listed on the tender list for the new Civic Centre was subsequently removed when Mrs George became the council's architect and was involved in the appraisal of the stage 1 tenders. It transpired that Mr George, the husband of Mrs George, was one of the directors of the plaintiff's company and because of that the plaintiff was removed from the tender list notwithstanding the fact that Mrs George did disclose who her husband was. The plaintiff considered that there was a breach of contract and sued the defendant. The trial judge dismissed the action and the plaintiff appealed. The Court of Appeal dismissed the appeal

and held that the defendant had fulfilled its obligation by giving some consideration to the tender and had acted reasonably. As can be seen, the facts in *Fairclough*'s case were poles apart from the present appeal and it had no bearing at all to the case presently under adjudication. Next, in regard to the issue of illegality, the defendant relied on the case of *Howard v Shirlstar Container Transport Ltd and another* [1990] 3 All ER 366, and factually this case was different from the present case. Howard's case was a case where the plaintiff had committed criminal acts in order to escape danger to his life. Briefly, the owner of the aircraft namely, the defendant agreed to pay Howard — the plaintiff, for successfully removing an aircraft from Nigerian territorial airspace. The plaintiff removed the aircraft without permission of the Nigerian authorities and landed in Ivory Coast. The plaintiff believed that his life was in danger in Nigeria. The plaintiff sued for his fees and he succeeded. Again *Howard*'s case was not relevant to the present case.

Proceeding further it was pointed out that the defendant expressed its bewilderment and shock in regard to the letter of gratitude that was sent by Syed Alwi. The defendant too denied the truth of Syed Alwi's letter and did not acknowledge the said letter. In short, the defendant was trying to distance itself from the said letter and any implications which may arise therefrom. It was pointed out that that letter was written without any authority and was authored by the author who was on a frolic of his own. Of course, the defendant was referring to Syed Alwi and was, in fact, casting aspersions on his character. In rebuttal to what the defendant had said in regard to Syed Alwi's letter, it was submitted that the plaintiff relied on the rule in *Turquand*'s case. It was said that the plaintiff also relied on the averment that Syed Alwi's letter was obtained in the ordinary course of its dealings with the defendant. It was submitted on behalf of the defendant that the plaintiff could not invoke *Turquand*'s rule because nowhere in the plaintiff's affidavits were there averments that the plaintiff did not have any knowledge of want of authority or irregularity in the defendant's company notwithstanding the fact that the plaintiff knew by way of affidavit evidence that the defendant had challenged the authenticity of Syed Alwi's letter. It was also submitted that the bare statement by the plaintiff to the effect that the plaintiff received Syed Alwi's letter in the normal course of his dealings with the defendant did not qualify the plaintiff to rely on the rule in *Turquand*'s case. It was emphasized that the defendant's submissions on these lines must be taken in the context that there was a blanket denial that the defendant did enter into a contractual relationship with the plaintiff. It was submitted on behalf of the defendant that the issue of illegality was linked to the issue of *Turquand*'s rule in that the plaintiff in invoking the rule failed to aver in his affidavits to any lack of knowledge or constructive notice as to the internal affairs of the defendant's company. These 'magical words' were not employed by the plaintiff in his affidavits and because of this failure the plaintiff was said to be barred from relying on the rule in *Turquand*'s case. It was further pointed out that the issue of illegality can only be satisfactorily ventilated in the course of the trial. All these submissions were certainly interesting. But it overlooked one salient feature: that there was no affidavit affirmed by Syed Alwi to deny that he ever wrote that damning

letter. Must the plaintiff employ those 'magical words' in his affidavits before the plaintiff could rely on the rule in *Turquand*'s case? Certainly not. Since there was no denial by the defendant that its executive director by the name of Syed Alwi had written that damaging letter, the irresistible inference would be that the internal affairs of the defendant's company were in order. The plaintiff too may assume, as I said earlier, that all was being done regularly: *omnia praesumuntur rite ac solemniter esse acta*. Therefore, there was no necessity for the plaintiff to employ those 'magical words' before he resorted to the rule in *Turquand*'s case and it was on this score that the case of *Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors* [1998] 1 MLJ 465 can be distinguished and differentiated from the factual matrix of the present case. The exception to the rule in *Turquand*'s case was amply set out by Edgar Joseph Jr FCJ in the case of Pekan Nenas. At p 507 to p 509 of the report, his Lordship Edgar Joseph Jr FCJ had this to say:

> To put it another way, such an outsider may rely on the rule in *Turquand*'s case which, when it applies, gives rise to an *irrebutable presumption*, so that the company concerned is debarred from establishing or relying on the fact that the proceedings were irregular and unauthorized.
>
> The rule in *Turquand*'s case cannot, however, be invoked by an outsider who knows or ought to know that there is an irregularity.
>
> More particularly, outsiders dealing with a company who know that some relevant procedure internal to the company has not been followed cannot invoke the benefit of the indoor management rule (see *Howard v Patent Ivory Manufacturing Co* (1888) 38 Ch D 156). This is an exception to the rule in *Turquand*'s case and the burden of establishing it lies on the party invoking the exception and in this case, that would be the Father and his faction. Furthermore, outsiders dealing with a company could also be affected by knowledge of facts which would put a reasonable person *on inquiry*, in other words, they would be deemed to know what a reasonable person would infer from known facts. So, for example, in *B Liggett (Liverpool) Ltd v Barclays Bank Ltd* [1928] 1 KB 48 at pp 56–56, Wright J (as he then was) said:
>
> > '... Whatever may be the exact scope of the rule in *Turquand*'s case, I think it is quite clear on principle and on the authorities I have already referred to that it can never be relied upon by a person who is put on inquiry. The rule proceeds on a presumption that certain acts have been regularly done, and if the circumstances are such that the person claiming the benefit of the rule is really put on inquiry, if there are circumstances which debar that person from relying on the prima facie presumption, then it is clear, I think, that he cannot claim the benefit of the rule...'
>
> And, in *Morris v Kanssen & Ors* [1946] AC 459, Lord Simonds made it clear that an outsider cannot invoke the benefit of the *Turquand* rule if he is put upon inquiry. Here is what his Lordship said on this point (at p 475):
>
> > ' ...He cannot presume in his own favour that things are rightly done if inquiry that he ought to make would tell him that they were wrongly done'.
>
> So also, an outsider dealing with a company cannot invoke the benefit of the *Turquand* rule if he could or should in the circumstances have discovered the defect by inspecting the compulsory documents filed at the Registry of Companies which are open to public inspection. (See *Irvine v Union Bank of Australia* (1877) 2 App Cas 366).

The material time at which there must be knowledge or the means of knowledge is the time of entry into the transaction. (See *Kanssen v Rialto (West End) Ltd & Ors* [1944] Ch 346; *Morris v Kanssen & Ors* [1946] AC 459). A

We need hardly add that the rule in *Turquand*'s case is designed to protect not the company itself but persons dealing with the company. It follows that there is no reason why persons, including outsiders, who enter into transactions with a company, and who are sued should not invoke the benefit of the rule as a *defence*. (See *Howbeach Coal Co Ltd v Teague* (1860) 5 H & N 151, 157 ER 1136; *Garden Gully United Quartz Mining v McLister* (1875) 1 App Cas 39). B

So far as the burden of proof is concerned, when the doctrine of the bona fide purchaser for value without notice is invoked, we are inclined to the view that the burden of showing lack of notice is on the person invoking the doctrine. (See *Ninety-Five Pty Ltd v Banque Nationale de Paris* (1988) WAR 132; cf *Re Dover Pty Ltd* (1981) 6 ACLR 307 atp 310). C

Whether or not the outsider was put on notice is a question of fact on which other cases are of no assistance.

When, as in this case, it is alleged that the circumstances raised a doubt regarding a possible *abuse of power*, the purpose of inquiry is not to ascertain that the transaction is in fact regular but merely to negative or neutralize the circumstances of suspicion. The outsider is entitled to enforce the contract provided that he acts in good faith and without notice that the authority is being abused. It follows that *reasonable explanations given by the agent in answer to inquiries would in such a case suffice* (*AL Underwood Ltd v Bank of Liverpool and Martins; Same v Barclays Bank* [1924] 1 KB 775). D E

However, where there is doubt regarding the *existence of power*, the outsider who is put upon inquiry cannot proceed until he has ascertained that actual authority exists or fresh material is disclosed upon which to base a claim of ostensible authority. In such a situation, assurances by an agent that he has authority will not suffice to found a plea of estoppel against the company. *Consequently, reasonable explanations given by an agent will not help the outsider* (see *AL Underwood Ltd v Bank of Liverpool*). F

and flowing from this case, certain salient questions must be posed and the answers thereto would be supplied:

(1) As an outsider, did the plaintiff know or ought to know that there was an irregularity in the defendant's company? No, he did not. The plaintiff was dealing with Syed Alwi — an executive director of the defendant — and the plaintiff acting in good faith treated Syed Alwi as capable of binding the defendant by entering into that contract. The plaintiff too was dealing with Wahab who acted for the defendant. G

(2) When was the material time at which there must be knowledge or the means of knowledge by the plaintiff in regard to the internal management of the defendant's company? At the time when the oral agreement was reached between the plaintiff and the defendant (which includes the defendant's employees and its agents) wherein by way of a consideration for securing the contract with Petronas Carigali, the plaintiff shall be paid for the advisory services expended by him an amount equivalent to 1% of the contract value limited to a maximum amount of RM12m. It must be borne in mind that the H I

plaintiff was led to believe that he would be paid by the defendant 1% of the value of the contract limited to RM12m. The plaintiff was not put on notice by the defendant's employees and its agents to check the internal affairs of the defendant's company. When the plaintiff secured the Petronas Carigali contract to the value of RM2,107,103,013 in favour of the defendant, the latter accepted that contract and paid the plaintiff for services rendered through two of the plaintiff's companies the sum of RM700,000. Everything went on smoothly. Now the defendant refused to pay the balance sum of RM11.3m to the plaintiff.

It is ideal, at this juncture, to refer to a textbook entitled '*Palmer's Company Law*', 21st edition by Clive M Schmitthoff and James H Thompson and that textbook carries a good literature on *Turquand*'s rule. At p 249 to p 250, the learned authors had this to say:

> A person who deals with a company and who is on notice of an irregularity in its internal management in connection with the subject matter of his dealings cannot claim the benefit of the rule in *Turquand*'s case (*Morris v Kanssen* [1946] AC 459,476).

Continuing further, the learned authors said:

> Thus, a director of the company cannot normally claim such a benefit, at least where he is also acting for the company in the transaction. Where directors were empowered to borrow up to 1,000 pounds and such further sums as the company in general meeting might authorize, and to secure such borrowings, debentures were issued to them for sums in excess of 1,000 pounds borrowed without the authority of the general meeting, the debentures were invalid.
>
> WHAT CONSTITUTES KNOWLEDGE OF AN OUTSIDER COMPANY. A company is not automatically on notice of irregularity in the internal management of another company with which it is dealing, where it has a common officer with that other company, eg, a common director or secretary. At all events the outsider company will not be upon such notice unless 'the common officer had some duty imposed upon him to communicate that knowledge to the other company, and had some duty imposed upon him by the company which is alleged to be affected by the notice to receive the notice.' (per Vaughan Williams J in *Re Hampshire Land Co* [1896] 2 Ch 743; approved by himself in *Young v David Payne & Co* [1904] 2 Ch 608 (CA)).
>
> *Persons on inquiry*
>
> If a person is put upon inquiry he cannot claim the benefit of the rule in *Turquand*'s case in circumstances under which he would have discovered the irregularity if he had made the proper inquiries.
>
> Thus, where a sole director and principal shareholder of a company paid into his own account cheques drawn in favour of the company, the bank into which such payment was made was held to be put upon inquiry, and the bank was accordingly disentitled to rely upon the ostensible authority of the director. Similarly a bank was put upon inquiry where directors of a company secured their own indebtedness by a charge upon the company's property and was not entitled to the benefit of the charge which had not in fact been authorized. A person dealing with a company may be upon inquiry by reason

of the unusual magnitude of the transaction, having regard to the position of the agent who is acting for the company. A

Now, in the context of the present case, the examples advanced by the learned authors of *Palmer's Company Law* to bar reliance on *Turquand*'s rule can never be applied to the present plaintiff. The plaintiff here was not put on notice in regard to the irregularity of the internal management of the defendant's company. The plaintiff too was not a director nor a secretary of the defendant's company and thus he had no knowledge of the internal affairs of the defendant's company. It would be perverse in the extreme and would pervert the course of the administration of justice if the plaintiff here was restrained from relying on *Turquand*'s rule. In my judgment, the plaintiff was entitled to claim the benefit of the rule in *Turquand*'s case. B C

(3) Had the plaintiff, as an outsider, acted in good faith and without notice that the defendant's servants or agents had abused their authority? This was certainly the case where the plaintiff had acted in good faith and without notice that either Wahab or Syed Alwi had abused their authority. D

Reverting back to the issue of illegality, Mr Azrul submitted that the following authorities, namely:

(1) *Mustafa Osman v Lee Chua (P)*;

(2) *Snell v Unity Finance Ltd*; E

(3) *Thong Foo Ching & Ors v Shigenori Ono*; and

(4) *Pet Far Eastern (M) Sdn Bhd v Tay Young Huat & Ors* [1999] 5 MLJ 558.

were authorities wherein the illegality issues were raised in the context of statutory contraventions. *Mustafa Osman* was in relation to the National Land Code (Penang and Malacca) Titles Act 1963 and the Contracts Act 1950. *Snell*'s case was an illegality under the Hire-Purchase and Credit Sale Agreements (Control) Order 1960. The case of *Thong Foo Ching & Ors v Shigenori Ono* was in relation to an illegality under the Contracts Act 1950 while *Pet Far Eastern (M) Sdn Bhd* considered gambling activities as illegal under the Common Gaming Houses Act 1953. That being the case, these authorities were said to be factually different from the present case. It was further contended that the defendant had failed to show with sufficient clarity the illegality of the oral agreement that was reached between the parties. The plaintiff contended that he had clearly shown proof of an oral agreement between the parties on the strength of Syed Alwi's letter. Through this damning piece of documentary evidence the plaintiff had succeeded in showing that he had secured the Petronas Carigali contract for the defendant. In regard to the tender processes that were alluded to by the defendant, the plaintiff believed that through its assistance and consultancy services the Petronas Carigali contract was procured for the defendant. It was the stand of the plaintiff that what he had done did not violate the provisions of the Contracts Act 1950 nor any other provisions of any statutes. In short, the plaintiff pointed out that providing consultancy F G H I

services for a fee did not contravene the provisions of the Contracts Act 1950. I was shown a book entitled: '*The Law of Contract*', 7th Edn by GH Treitel particularly at pp 326 to 345 where the learned author listed 14 types of illegality, and it was rightly submitted that the instances of illegality as alluded to by the learned author were not applicable to the facts of the present case. Even the illegality issue that was ventilated by the Federal Court in the case of *Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong* [1998] 3 MLJ 151, revolved on the prohibition under s 21 of the Betting Act 1967 and by virtue of s 24(a) of the Contracts Act 1950, the Federal Court held that the agreement to assign wholly or partly the rights of the club granted by the federal licence by granting the appellant the exclusive right to conduct the off-course and on-course betting was illegal and void. Factually speaking, the facts of *Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong* were poles apart from the present case. Incidentally, s 24(a) of the Contracts Act 1950 enacts that an agreement is illegal and unenforceable when either the consideration or the object of the agreement is to do an act forbidden by law. In the present case, the consideration of the oral agreement as alluded to somewhere in this judgment was not forbidden by law at all.

Next, it was pointed out that the defendant heavily relied on the case of *Kiwi Brands (M) Sdn Bhd v Multiview Enterprises Sdn Bhd* [1998] 6 MLJ 38 to argue that the present case should proceed to trial. But the plaintiff urged this court to scrutinize with care Syed Alwi's letter which would show that there was no necessity to proceed to trial. The defendant argued that it was at a disadvantage in regard to Syed Alwi's letter. But the plaintiff pointed out that Syed Alwi's letter should be accorded the meaning which it was meant to convey and there were no strong reasons to disregard that letter. For this proposition, the plaintiff cited the case of *Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd* [1993] 3 MLJ 16 SC. That was a case where the former Supreme Court had to peruse through the 1990 letter in order to ascertain whether there was a settlement among the parties. Peh Swee Chin SCJ delivering the judgment of the then Supreme Court had this to say at p 22 to p 23 of the report:

> Looking more closely, the letter of 1990 does not have a heading containing the identifying numbers of the civil suit concerned herein so that its absence would have rendered it necessary for the writer of the letter of 1990, when offering a settlement, to express the particulars of the civil suit concerned herein in the body of the letter so that the addressee would be reminded of the nature of the claim of the plaintiff/company in the civil suit concerned herein, and above all, to relate the settlement to the said civil suit.
>
> It is further observed that at the foot of the letter of 1990, the addressee signed in confirmation of 'our acceptance of the offer and conditions as stated above' without any qualification.
>
> As part of the settlement, the plaintiff company agreed in effect in the letter of 1990 to 'withdraw the Kuala Lumpur High Court Civil Suit No D3-23-2194-87 as stated in their letter of 1 April 1989'. The words 'as stated in their letter of 1 April 1989', were relied on by the plaintiff/company and we will comment on them later on.

> It is to be borne in mind that it is the sole function of the court to construe a document with a view to finding the intention of the parties. The function is in reality to find the meaning of the words, for such meaning is equivalent to such intention of the parties for the purpose of interpretation. Please see a similar observation in *Shore v Wilson* [1942] AC & F 355 HL.
>
> The words about withdrawing the civil suit concerned herein in para 3 aforesaid, unless there is strong reason to disregard them totally, would have to be accorded the meaning they clearly convey. Such strong reason may be that the words are so repugnant to the rest of the letter of 1990, that they ought to be totally disregarded by applying the golden rule of construction.

And using these passages as a leverage, it was argued that Syed Alwi's letter showed the intention of the parties to the contract. It was emphasized that the defendant merely harped on the issue of ex facie illegality based on the presumption whereas the plaintiff was more specific and had shown proof of the existence of the oral agreement by relying on Syed Alwi's letter. The plaintiff laid emphasis on ss 2(d) and 2(e) of the Contracts Act 1950 and it was vigorously submitted that in Syed Alwi's letter there was an admission on the part of the defendant to make the payment for the balance sum of RM11.3m. It was submitted that since the defendant had reaped the benefit of the Petronas Carigali contract, the defendant cannot simply renege from its responsibility under the oral contract which was confirmed by its own executive director. It seemed that the defendant merely made a denial when confronted with Syed Alwi's letter. The defendant merely registered its shock and bewilderment at the existence of that letter.

Next, it was argued on behalf of the plaintiff that the contract between the parties was not illegal nor was it against public policy. It was interestingly argued that if the contract was indeed ex facie illegal then it was the duty of the defendant to lodge a police report in regard to the illegal activities resorted to by the plaintiff in securing the Petronas Carigali contract for the defendant. For the record, there was no police report lodged by the defendant against the plaintiff in regard to the success of the plaintiff in securing the Petronas Carigali contract for the defendant. To this day, no police report has been lodged. Now, it would be interesting to note that there were no denials whatsoever in the defendant's affidavits pertaining to the following set off acts:

(a) that Syed Alwi is the executive director of the defendant;

(b) that exh 'AZJ-2' of encl 5 was written by the defendant's executive director in the person of Syed Alwi; and

(c) that Syed Alwi as the defendant's executive director at the time of concluding the contract had all the authority to act in the way in which he did.

The defendant challenged the authenticity of Syed Alwi's letter along these lines:

(a) that the said letter was not in their custody;

(b) that the said letter came to the knowledge of the defendant after the action before this court was filed;

(c) that the letter was not written in the ordinary course of the defendant's business; and

(d) that there was defect in the said letter in that it was without a reference number and the title and the 'font' in the letter was not of the same size.

But the defendant did not deny that its executive director in the person of Syed Alwi had written that letter and this was the damaging feature in the present case. In that letter, the words 'marketing services' were employed and it referred to the services rendered by the plaintiff and the quantum of RM12m was mentioned therein. These words, in my judgment, described the type of services rendered by the plaintiff. And it must be borne in mind that these words were employed by Syed Alwi — the executive director of the defendant.

With regard to the case of *Pekan Nenas*, it was submitted on behalf of the plaintiff that that case was distinguishable from the facts of the present case. In *Pekan Nenas*, the issue of authority of the director was raised and it was denied by another director and as such reliance on Form 49 and the director's resolution were necessary. In the present case, the authority of the executive director in the person of Syed Alwi who dealt with the plaintiff at the time of the conclusion of the contract between the plaintiff and the defendant was not questioned by the defendant at all. And the fact that Syed Alwi was ostensibly placed as an executive director of the defendant company was not denied in any of the affidavits affirmed by Wan Ahmad. Furthermore, the issue of any irregularity at the time of the conclusion of the contract was not raised by the defendant at all. That being the case, the plaintiff was entitled to rely on the rule established in *Turquand*'s case and it was for this court to hold that the defendant was liable to the contract that was entered into through its executive director by the name of Syed Alwi. I would, with respect, agree to these salient submissions and I would apply them vigorously in this judgment. It was part and parcel of my judgment that the defendant was bound by the contract and the plaintiff was entitled to recover the balance sum of RM11.3m from the defendant.

With regard to the part payment of RM700,000 to the two companies, the plaintiff rightly submitted that the defendant never denied that such payments were made. In his letter, Syed Alwi explained that the two companies belonged to the plaintiff. I have somewhere in this judgment held that the plaintiff owned these two companies. It must be emphasized that the mode of payment of RM700,000 was agreed upon by the parties.

Next, with regard to the marketing services rendered by the plaintiff there was an acknowledgment by the defendant as reflected in Syed Alwi's letter to that effect. Between the parties there were exchanges of promises. If the plaintiff was able to secure the Petronas Carigali contract for the defendant, the plaintiff was to be paid RM12m. On the authority of *Wong Hon Leong David v Noorazman bin Adnan*, that constituted good consideration in law. An editor by the name of John Stapleton compiled a book entitled: '*Marketing Handbook*' and at pp 46–47 thereto, the following passages appear:

The marketing process

Marketing is marketing, say many. Hardly an arguable statement but also hardly a helpful one; hardly helpful because whilst acknowledging the existence of a concept it fails to acknowledge the differences required in the application of that concept by particular businesses. It fails to acknowledge that different businesses need to do different things.

The basis of all good professional services marketing depends on the soundness of five vital activities:

1 Identifying the market.

2 Selecting from what is available that part of the market which the enterprise seeks to satisfy and is able to penetrate.

3 Developing the services necessary to satisfy the market.

4 Persuading the market that the services of the enterprise can meet its real needs.

5 Monitoring changes in market attitudes.

The full effect of the plaintiff's marketing services was entirely post-operative. It was after the plaintiff had carried out his part of the bargain that the defendant saw the results: the Petronas Carigali contract was secured for the defendant to the tune of RM2,107,103,013. Consultancy services as alluded to by the plaintiff showed that the plaintiff had given to the defendant the benefit of the plaintiff's knowledge and experience and this fact was acknowledged by the defendant through Syed Alwi's letter. The word 'consultant' is defined in P Ramanatha Aiyar's, '*The Law Lexicon*' at p 396 as:

> an expression apparently meaning that the person consulted is to give to the company the benefit of his knowledge and experience, *Pocock v ADAC Ltd* [1952] 1 All ER 294, KB.

and this was what the plaintiff had done, so submitted Mr Mohd Noor. I entirely agree with his submission.

It was submitted that the defendant was resorting to all means to avoid paying the plaintiff the sum of RM11.3m. An example was cited. It was submitted that the issue of illegality which was not brought up before the learned deputy registrar was brought up before me as an afterthought. That by inference was true but I am bound to consider the issue of illegality even at this stage. Be that as it may, the illegal practices alleged to be committed by the plaintiff were not particularized at all. It must be recalled that the Court of Appeal in *Wong Hon Leong David v Noorazman bin Adnan* held that the exertions expended by the respondent there to secure the contract was not illegal. Likewise here, I could not imagine how the marketing services advanced by the plaintiff could be construed as illegal.

Some authorities were highlighted in favour of the defendant but these authorities can readily be distinguished on their own facts. In *United Merchant Finance Bhd v Majlis Agama Islam Negeri Johor* [1999] 1 MLJ 657 FC, the issue of constructive trustee compelled the Federal Court to rule that a full trial was required . Whereas in the present case, it was a simple contract of service between the parties which was quite straightforward and

summary judgment should be entered against the defendant. The striking out application under O 18 should not be entertained.

In *Kiwi Brands (M) Sdn Bhd v Multiview Enterprises Sdn Bhd*, the High Court dismissed the summary judgment application because, inter alia, the affidavit in support contained matters which extended beyond the statement of claim. Here, in the present case, the averments in the plaintiff's affidavits did not go beyond the scope of the statement of claim.

In *Abdul Rahim bin Abdul Hamid & Ors v Perdana Merchant Bankers Bhd & Ors* [2000] 2 MLJ 417 (CA), the Court of Appeal had this to say with regard to an O 14 application filed by the plaintiff (see pp 470–471 of the report):

> In a nutshell, in an application under O 14 made by the plaintiff for summary judgment without trial, the general principles established are that the plaintiff has to satisfy the court that the defendant plainly and obviously has no defence to the plaintiff's claim or part of the plaintiff's claim. If the plaintiff is able to satisfy the court, then summary judgment should be entered in the plaintiff's favour. On the other hand, if the defendant can show that there is a serious conflict of material facts as disclosed in the opposing affidavits, or there is otherwise a triable issue worthy of judicial investigation in the trial of the action, or there is an important and difficult point of law requiring further and mature consideration at the trial, summary judgment should be refused. These general principles are also applicable to a counterclaim by a defendant against the plaintiff in the same civil action when an application is made under O 14 r 5.

Of course, these are general principles of law on summary judgment which was said in the context of that case. That was a case involving two civil actions — a JB action and a KL action. These actions arose from a loan granted by the first respondent (Perdana Merchant Bankers Bhd) and five other financial institutions ('the lenders') to the fifth appellant — a company known as Carah Enterprise Sdn Bhd ('Carah'). In the JB action, Carah was the plaintiff while the defendant was Perdana Merchant Bankers Bhd ('Perdana'); and Carah was sued in its capacity as the principal and trustee, manager and agent for the lenders. Again in the JB action, the lenders through Perdana applied to strike out Carah's writ of summons and the statement of claim under O 18 r 19(1)(a), (b) and (d) of the RHC and at the same time, the lenders applied for summary judgment under O 14 of the RHC on their counterclaim against Carah.

While in the KL action, the plaintiffs were Perdana and the lenders were the four defendants who were the guarantors of the loan. In the KL action, the plaintiffs applied for summary judgment under O 14 of the RHC.

Factually speaking, the case of *Abdul Rahim Abdul Hamid & Ors v Perdana Merchant Bankers Bhd & Ors* can readily be distinguished. Here, there was no serious conflict of material fact disclosed in the opposing affidavit. Here too, there was no difficult point of law to be adjudicated upon and it was a fit and suitable case for summary judgment. There, lengthy affidavits and various exhibits were filed by both parties. There too,

there was a need to subject the deponents of the affidavits to cross-examination. Here, the facts as revealed from the statement of claim and the affidavits revolved on the plaintiff's letter dated 14 August 1998 as per exh 'AZJ-1' of encl 5 as well as Syed Alwi's letter as seen in exh 'AZJ-2' of encl 5. It was a case, pure and simple, within the framework of *Wong Hon Leong David v Noorazman bin Adnan*.

This was a case where the plaintiff had rendered his 'knowledge and experience' to secure the Petronas Carigali contract for the defendant. All the other cases on illegality that were relied upon by the defendant were factually different and they were emphasized to cloud the real issue — which was the promise to pay upon the promise to secure the Petronas Carigali contract. Syed Alwi's letter served to differentiate the present case from those other cases that were relied upon by the defendant. No argument was advanced by the defendant to say that Syed Alwi's letter was illegal. Syed Alwi himself did not aver an affidavit to say that his letter was prepared illegally. The reality of the matter was this: that Syed Alwi's letter reflected the truth of what had actually transpired and the truth would always be difficult to swallow. Syed Alwi's letter confirmed the existence of the contract between the plaintiff and the defendant. The essence of the contract can be distilled from Syed Alwi's letter. From the affidavits of Wan Ahmad, the following set off acts may be arrived at:

(1) that there was no denial in regard to the authority of Syed Alwi;

(2) that there was no denial that Syed Alwi is the executive director of the defendant;

(3) that there was no denial that Syed Alwi in his letter had confirmed the contract on behalf of the defendant which contract was entered with the plaintiff,

and all these facts, at the end of the day, gave credence to the plaintiff's story and that was that there was truly a contract and as a result thereto the defendant was obliged by law to pay the balance of RM11.3m to the plaintiff. In my judgment, there was no triable issue at all and this was confounded by the fact that the defendant had no defence to the action. Summary judgment should, in my judgment, be given in favour of the plaintiff. This meant that the appeal by the defendant in encl 19 should be dismissed with costs.

With regard to the appeal in encl 20 which was an appeal filed by the defendant against the learned deputy registrar's refusal to strike out the plaintiff's writ of summons and the statement of claim under O 18 r 19 of the RHC, that appeal too on the facts must fail. I have no hesitation in dismissing the appeal in encl 20 with costs and I so ordered accordingly. It was undeniable that the defendant had benefited under the contract. This was confirmed by Syed Alwi's letter. The facts revealed a cause of action against the defendant and that cause of action still persist to this day. An argument was advanced on behalf of the defendant that the parties were not sufficiently identified in the oral contract. The answer to this argument can be seen in Syed Alwi's letter which categorically showed that the parties

were identified as such. Syed Alwi in clear language admitted in his letter that the plaintiff had rendered the services and that being the case, a cause of action was truly in existence. There was indeed a contractual relationship between the plaintiff and the defendant as reflected in Syed Alwi's letter.

It was submitted on behalf of the defendant that there was no consideration to the contract between the parties. With respect, that submission was without merit. A sum of RM700,000 had been paid to the plaintiff's two companies as reflected in exhs 'AZJ 4' and 'AZJ 5' of encl 12. This was also confirmed by Syed Alwi in his letter. The contents of Syed Alwi's letter deserved scrutiny. That very letter showed the intention of the parties. That very letter identified the following salient points:

(1) the contract number;

(2) the parties involved;

(3) the amount that was partially paid to the plaintiff's two companies; and

(4) the balance due that needed to be paid to the plaintiff even though there was no reference nor heading as suggested by the defendant.

The defendant was not too pleased with Syed Alwi's letter. It was argued, as alluded to earlier, that Syed Alwi's letter was defective and the following reasons were advanced for the proposition:

(1) that the letter had no format or reference number; and

(2) that the font was different from one another.

But with respect, it did not mean that the plaintiff had no cause of action against the defendant. The statement of claim as presently worded sufficiently showed a reasonable cause of action. According to Lord Pearson in *Drummond-Jackson v British Medical Association* [1970] 1 WLR 688; [1970] 1 All ER 1094 (CA), a reasonable cause of action means a cause of action with some chance of success. In *Davey v Bentinck* [1893] 1 QB 185 (CA), it was held that so long as the statement of claim disclosed some cause of action or raised some question fit to be decided by the judge or jury, striking out would not be entertained. In *Moore v Lawson* (1915) 31 TLR 418 (CA) and in *Wenlock v Moloney* [1965] 1 WLR 1238; [1965] 2 All ER 871 (CA), the courts there laid down the following simple and logical principle of law: the mere fact that the case was weak and not likely to succeed, was not a ground for striking it out. Indeed this simple proposition of the law when applied to the factual matrix of the present case would prevent this court from striking out the plaintiff's statement of claim. Back home, there is the case of *Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd & Anor* [1984] 2 MLJ 105 (FC), a decision of Wan Suleiman FJ, where at p 109 of the report his Lordship laid down the law with regard to striking out in these words:

> It cannot be gainsaid that under O 18 r 19 pleadings will only be struck out in plain and obvious cases. So long as the Statement of Claim discloses some ground of action, the mere fact that the plaintiff is unlikely to succeed at the trial is no ground for striking out. See *Mooney v Peat Marwick & Mitchell*

[1967] 1 MLJ 87. We need only refer to a passage from another authority referred to by learned counsel, the Privy Council decision in *Rediffusion (Hong Kong) Ltd v Attorney General of Hong Kong* [1970] AC 1136:

> 'It is a well established principle that the summary power under RSC Order 18 r 19 to strike out a writ or pleading as disclosing no reasonable cause of action or defence should be exercised only in plain and obvious cases... . No evidence is admissible on a cause of action summons ... the only documents that can be looked at are the writ, the documents referred to in the writ... '

In *Ng Kian Chong & Ors v Saw Seng Kee* [1994] 3 MLJ 691, the court there adopted the same line of approach. And using these authorities as a springboard, it was argued that the present case was not plain and obvious which would entitle the defendant to strike out the plaintiff's claim. In the context of O 18 r 19 of the RHC, there was certainly a reasonable cause of action in the plaintiff's statement of claim. I venture to say that no matter how weak the cause of action is, the court should not simply strike out a statement of claim.

With regard to the issue that the pleading was frivolous and vexatious, I need to refer, once again, to the case of *Ng Kian Chong & Ors v Saw Seng Kee* where the court there made the following observations with regard to that issue (see p 699 of the report):

> Frivolous and vexatious
>
> These words relate to cases which are obviously unsustainable as would amount to an abuse of the process of the court. The courts must in their judicial discretion determine whether the proceedings are frivolous and vexatious (see *A-G of the Duchy of Lancaster v London & North Western Railway Co* [1892] 3 Ch 274). It is now trite law that the court will not permit a plaintiff to be ousted from the judgment seat, so to speak, except where the cause of action is obviously bad and 'almost incontestably bad' (*Dyson v A-G* [1911] 1 KB 410). The pleading must, in all the circumstances, be so obviously frivolous that to advance it forward must be an abuse of the process of the court (*Young v Holloway* [1895] P 87).'

and, in the context of the present case, the pleading was not frivolous and vexatious.

With regard to the defence of mere denial, the Federal Court in *Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd & Anor* rejected that kind of defence. Likewise here, I was urged to reject the denial by the defendant with regard to the existence of the contract between the parties. Viewing the whole case in its correct perspective, I hold and it was part and parcel of my judgment that the action taken by the plaintiff against the defendant was sustainable and was not frivolous and vexatious. Syed Alwi's letter was a clear and unequivocal admission by the defendant of the contract between the parties. There was no bona fide dispute between the parties at all. It would not be out of place, at this juncture, to refer to the case of *Re Sunshine Securities (Pte) Ltd; Sunshine Securities (Pte) Ltd & Anor v Official Receiver And Liquidator of Mosbert Acceptance Ltd* [1978] 1 MLJ 57, a decision of the Singapore Court of Appeal. That case involved an appeal from an order made in a winding up petition. The respondents, the liquidator of Mosbert

A Acceptance Ltd, had written to the appellant demanding payment of a debt of HK$ 529,054.97. The first appellant by its solicitor's letter admitted the debt and asked for two months to pay. Subsequently, the first appellant's solicitor wrote a 'without prejudice' letter asking for particulars of the debt. The respondent through his solicitors refused to grant the two months' extension and demanded payment. No reply was given to the first B appellant's further request for particulars. The respondent subsequently filed a petition for winding up and an order was made accordingly. The appellants then lodged an appeal. In dismissing the appeal, the Singapore Court of Appeal held that having regard to the clear and unequivocal admission of the petitioner's debt contained in the first letter, the trial court C was entitled to come to the conclusion that there was no bona fide dispute. It was also held that as the company had failed to pay or give security for the debt for which a statutory demand had been made, the company was said to be insolvent and may be wound up. Rajah J delivering the judgment of the Singapore Court of Appeal, after reviewing the facts and the law, aptly said at p 59 of the report:

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> Having regard to the clear and unequivocal admission of the petitioner's debt contained in the first letter the learned judge was entitled to come to the conclusion that there was no *bona fide* dispute.

Of course, *Re Sunshine Securities (Pte) Ltd*'s case was in relation to a winding E up petition but the principle of law distilled in that case was apt and should be applied to the facts of the present case. An admission by the defendant that the sum of RM11.3m was due and forthcoming to the plaintiff from the defendant must be held adversely against the defendant. It was certainly an abuse of the process of the court when the defendant filed an O 18 application. The present case squarely falls under the category of an abuse F of the process of the court (*Ng Kian Chong & Ors v Saw Seng Kee*) and the only conclusion that flows from the set of facts would be a dismissal of encl 20 with costs.

Not to be outwitted, the defendant argued that the net effect of the statement of claim was to show that the plaintiff was responsible in G obtaining the contract for the defendant based on the belief that he would be paid by the defendant. But the defendant pointed out that the pleading as it stood was bad because there was nothing to show that the contract was procured through the services rendered by the plaintiff. The defendant relied heavily on the case of *South Hetton Coal Co v Haswell, Shotton, And Easington Coal & Coke Co* [1898] 1 Ch 465 in an attempt to strike out the H plaintiff's statement of claim. But that was a case that hinged on a sale by tender which was dependent on the 'highest net money tender' and it would certainly, on the facts, be poles apart from the present case. Briefly, the facts in that case may be stated as follows. There the owner of certain coal mines proposed to receive sealed tenders from two parties who were competing for the purchase of the coal mines, and the owner undertook to accept the I highest net money tender. One of the competitors offered such a sum as would exceed by 200 pounds the amount offered by the other. It was held that the tender in this form did not answer the description of the highest net

money tender, and an order was made striking out the statement of claim in an action for specific performance of an alleged contract founded on such tender as disclosing no reasonable cause of action. As I said, the case of *South Hetton Coal Company* was entirely different from the present case. The facts of that case can easily be distinguished and differentiated. That case too was of no help to the defendant at all.

It was argued that the contract sum amounting to RM2,107,103,013 which the plaintiff had secured from Petronas Carigali for the benefit of the defendant cannot possibly be proved by a bare allegation. It too, according to the defendant, could not be proved by mere reliance on Syed Alwi's letter. At best, according to the defendant, Syed Alwi's letter was merely a statement made pursuant to a request which may or may not be agreed upon. My attention was drawn to the case of *Chan Yuet Chun @ Chan Oi Lin (Berniaga Sebagai Wing Sun Trading Co) v Martego Sdn Bhd* [1996] 2 CLJ 431 but that case was of no relevance at all. That was a case of oral negotiations that were subject to the drafting of a formal contract. It was a case categorized under the 'subject to contract' and it was certainly unlike the present case. Syed Alwi's letter confirmed the existence of the oral contract between the parties. Syed Alwi's letter did not employ the words 'subject to contract' at all and thus the case of *Martego Sdn Bhd* was of no relevance at all.

I have deliberated at length and I have scrutinized the available evidence with a toothcomb. It was an in depth scrutiny. The failure of Syed Alwi to affirm an affidavit in support of the defendant must be construed adversely against the defendant. Looking at the nature of the plaintiff's claim it would be correct to say that:

(1) the plaintiff's summary judgment under O 14 of the RHC should be allowed and this meant that the defendant's appeal in encl 19 should be dismissed with costs; and

(2) the defendant's application to strike out the plaintiffs writ of summons and the statement of claim under O 18 r 19(1)(a), (b) and (d) of the RHC and under the inherent jurisdiction of the court should be dismissed and the net result would be that the appeal in encl 20 should be dismissed with costs.

On the issue of public policy, I have this to say: that the contract between the parties was not against public policy. Section 24(e) of the Contracts Act 1950 enacts as follows (the relevant portions only);

> The consideration or object of an agreement is lawful, unless:
>
> (e) the court regards it as immoral, or opposed to public policy. In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

On public policy, Lord Denning MR in *Enderby Town Football Club Ltd v Football Association Ltd* [1971] 1 Ch 591 (CA) in fine language said at p 606 to p 607 of the report:

A preliminary point arises here: Has the court any power to go behind the wording of the rule and consider its validity? On this point Sir Elwyn Jones made an important concession. He agreed that if the rule was contrary to natural justice, it would be invalid. I think this concession was rightly made and I desire to emphasize it. The rules of a body like this are often said to be a contract. So they are in legal theory. But it is a fiction — a fiction created by the lawyers so as to give the courts jurisdiction. This is no new thing. There are many precedents for it from time of John Doe onwards. Putting the fiction aside, the truth is that the rules are nothing more nor less than a legislative code — a set of regulations laid down by the governing body to be observed by all who are, or become, members of the association. Such regulations, though said to be a contract, are subject to the control of the courts. If they are in unreasonable restraint of trade, they are invalid: see *Dickson v Pharmaceutical Society of Great Britain* [1967] Ch 708; [1970] AC 403. If they seek to oust the jurisdiction of the court, they are invalid: see *Scott v Avery* (1856) 5 HL Cas 811. If they unreasonably shut out a man from his right to work, they are invalid: see *Nagle v Feilden* [1966] 2 QB 633; *Edwards v Society of Graphical and Allied Trades* [1971] Ch 354. If they lay down a procedure which is contrary to the principles of natural justice, they are invalid: see *Faramus v Film Artistes' Association* [1964] AC 925, 947, per Lord Pearce. All these are cases where the judges have decided, avowedly or not, according to what is best for the public good. I know that over 300 years ago Hobart CJ said the 'Public policy is an unruly horse.' It has often been repeated since. So unruly is the horse, it is said [per Burrough J in *Richardson v Mellish* (1824) 2 Bing 229, 252], that no judge should ever try to mount it lest it run away with him. I disagree. With a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles. It can leap the fences put up by fictions and come down on the side of justice, as indeed was done in *Nagle v Feilden* [1966] 2 QB 633. It can hold a rule to be invalid even though it is contained in a contract.

Take an instance from this present case. The FA have a rule 40(b) which says:

> 'The rules of the association are sufficient to enable the council as the governing authority to deal with all cases of dispute, and legal proceedings shall only be taken as a last resort, and then only with the consent of the council.'

If that rule were valid, it would prevent the club from bringing any action in the courts without the consent of the council. But the rule is plainly invalid. Foster J said that 'it is against public policy to make provisions ousting the jurisdiction of the court.' Lord Kibrandon in Scotland said simply that it is 'contrary to public policy': see *St Johnstone Football Club Ltd v Scottish Football Association Ltd*, 1965 SLT 171.

In the local context, the case of *Koid Hong Keat v Rhina Bhar* [1989] 3 MLJ 238 — a decision of Wan Adnan J (now the President of the Court of Appeal) must be referred to. That was a case where the defendant, an advocate and solicitor, applied to strike out the plaintiffs action which was brought pursuant to an oral agreement by the defendant to pay 10% of the fees collected by the plaintiff upon the conclusion of each case referred to the defendant by the plaintiff. The defendant argued that the oral agreement was contrary to public policy. His Lordship Wan Adnan J (now the President of the Court of Appeal) held that the oral agreement was valid despite the argument that the plaintiff was a tout and that touting was

contrary to public policy. Of pertinence would be the speech of his Lordship at p 1222:

> Further what is injurious to public welfare in England may not necessarily be so in Malaysia and vice versa. What is and what is not injurious to public welfare in Malaysia must be decided in the Malaysian context.

Now, in the Malaysian context, the oral contract that was entered into, between the parties and confirmed by the letter of Syed Alwi was not against public policy. In *Theresa Chong v Kin Khoon & Co* [1976] 2 MLJ 253, the court held that a contract entered into by an unregistered remisier in contravention of the rules and bye-laws of the Stock Exchange was not contrary to public policy because the court held the view that not being registered as a remisier was not contrary to public policy because the bye-laws of the Stock Exchange were not the bye-laws of a private body which have no force of law. The parameters of public policy are not limited. Its scope can never be itemized. It is a subject that is constantly changing with the times. In *Rattan Chand Hira Chand v Askar Nawazjung (deceased)* (1991) 3 SCC 67, Fathima Beevi J observed at p 79 of the report:

> Public policy is a principle of judicial interpretation founded on the current needs of the community. The law relating to public policy cannot remain immutable. It must change with the passage of time.

In the same vein, K Ramaswamy J in *Gurmukh Singh v Amar Singh* (1991) 3 SCC 79 at p 86 remarked:

> The public policy is not static. It is variable with the changing times and the needs of society. The march of law must march with the fact situation.

And 'marching' with the times, the contract between the parties in the present case can never be construed as a contract that runs counter to Malaysian public policy. This was my judgment and I so hold accordingly. I am entitled to come to this conclusion because to borrow the words of Lord Lyndhurst in *Egerton v Earl Brownlow* 4 HLC, 151:

> Each case must be determined according to its own circumstances.

Viscount Haldane in *Rodriguez v Speyer Brothers* [1919] AC 59, at p 79 aptly said in almost the same vein that:

> ... what the law recognizes as contrary to public policy turns out to vary greatly from time to time.

Sir James Colville in *Evanturel v Evanturel* (1874) LR 6 PC 1 at p 29 in graphic words said:

> It was well observed during the argument that the determination of what is contrary to the so-called 'policy of the law' necessarily varies from time to time. Many transactions are upheld now by our own courts which a former generation would have avoided as contrary to the supposed policy of the law. The rule remains, but its application varies with the principles which for the time being guide public opinion.

Reverting back to the issue of illegality, I was urged to rule that the contract entered between the parties was illegal as it contravened the common law. For this proposition, the defendant cited two authorities. Firstly, *Enderby Town Football Club Ltd v Football Association Ltd.* Secondly, *Berg v Sadler And Moore* [1937] 2 KB 158. But these two authorities were factually different from the present case. The facts in *Enderby Town Football Club Ltd v Football Association Ltd* may be stated as follows. There the Football Association Ltd ('FA') controlled the association football. County associations were affiliated to it. The plaintiff club was fined and censured by its county association. The club appealed to the FA and claimed the right to be represented by solicitor and counsel when the appeal was heard. The FA rejected the claim relying on their r 38(b) which excluded legal representation save where the lawyer was chairman or secretary of the club to be represented. Foster J refused the club's claim to an injunction restraining the FA from hearing the appeal unless the club was permitted to be legally represented. On appeal by the club, the Court of Appeal dismissed the appeal and held that the FA r 38(b) was not invalid as being contrary to natural justice.

Berg v Sadler & Moore [1937] 2 KB 158 was a case where the plaintiff procured the contract by false pretences and where the court had to apply the well known maxim *ex turpi causa non oritur actio.* The plaintiff in that case was formerly a member of a tobacco association but had been placed on its stop-list for breach of its rules and was therefore unable to obtain supplies of cigarettes from any of its members. So the plaintiff arranged with Reece, who was a member of the association where Reece should order in his own name from the defendants who were wholesale members of the association to supply the cigarettes which the plaintiff required. Reece then ordered the cigarettes. Schlisser, one of the plaintiff's assistants, accompanied by one of Reece's representatives, attended the defendants' premises to receive the cigarettes and to pay the money for them. Schlisser paid the money but the defendant having doubts as to the bona fides of the transaction refused either to deliver the cigarettes or to return the purchase money. The plaintiff thereupon brought the present action for the recovery of the money. Macnaghten J who tried the case dismissed it on the ground that the plaintiff had been guilty of an attempt to obtain goods by false pretences and his Lordship refused to assist him to recover the money. On appeal, the Court of Appeal affirmed the decision of Macnaghten J. The Court of Appeal held that to succeed in the action for money had and received, the plaintiff must prove the exact circumstances in which the money was paid and the circumstances which he said entitled him on ground of justice to have an order for repayment. It was also held that the plaintiff could only establish his claim by proving facts which showed that he was engaged in a criminal attempt to obtain goods by false pretences.

Now, in the context of the present case, the plaintiff had expended his exertions in securing the Petronas Carigali contract and he was successful in his endeavours. What the plaintiff did came within the ambit of s 2(d) of the Contracts Act 1950 in that the promisee had done something at the

desire of the promisor and the act of the promisee can be construed as a consideration for the promise. This was indeed a simple case of a promise in exchange for a promise. The plaintiff promised that he would assist in obtaining the Petronas Carigali contract. In return, the defendant promised to pay the plaintiff RM12m for that kind of service. The exchange of mutual promises, although executory, was a good consideration under the law (see s 2(e) of the Contracts Act 1950). There was, in my judgment, a binding agreement between the parties hereto.

The elements of a valid contract can readily be seen in the present case and these elements may be stated as follows:

(1) there must be two or more separate parties to the contract (*Grey v Ellison* (1856) 1 Giff 436);

(2) there must be definite parties to the contract (*Henderson v Astwood, Astwood v Cobbold, Cobbold v Astwood* [1894] AC 150 (PC); and *Ingram v IRC* [1997] 4 All ER 395 (CA); and *Kelner v Baxter* (1866) LR 2 CP 174) who are ascertained and existing at the time when the contract is made;

(3) the parties must be in agreement (*Ridley v Lee* [1935] Ch 591);

(4) there must be a concluded bargain (*May v Butcher Ltd* [1934] 2 KB 17 n at 21);

(5) the parties must intend to create legal relations (*Merritt v Merritt* [1970] 2 All ER 760, [1970] 1 WLR 1211; *McGregor v McGregor* (1888) 21 QBD 424; *Pearce v Merriman* [1904] 1 KB 80; and *Re Windle* [1975] 3 All ER 987, [1975] 1 WLR 1628) and a mere 'puff' is not enforceable because it is not intended to form the basis of a binding contract (*Carlill v Carbolic Smoke Ball Company* [1893] 1 QB 256); and

(6) the promises of each party must be supported by consideration (*Currie v Misa* (1875) LR 10 Ex 153; and *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847).

That brilliant judge by the name of Lord Denning MR in *Butler Machine Tool Co Ltd v Ex-Cell-O Corporation (England) Ltd* [1979] 1 All ER 965 held the view that in order to determine an agreement, the whole circumstances should be examined. His Lordship too was of the view in *Gibson v Manchester City Council* [1978] 2 All ER 583 (CA) that it was 'a mistake to think that all contracts can be analysed into the form of offer and acceptance.' His Lordship added that one must 'look at the correspondence as a whole and at the conduct of the parties and see therefrom whether the parties have come to an agreement on everything that was material'. Now, applying these principles of law to the facts of the present case, I must hold that Syed Alwi's letter 'mirrored' what had actually transpired between the parties thereto. It showed a binding contract between the parties enforceable in a court of law. Syed Alwi, as an agent, had an apparent authority to write that damning letter and the plaintiff, as a person dealing with the defendant, was entitled to assume that all matters of internal management and procedure prescribed by the articles had been complied

with. In short, the indoor management rule must be construed in favour of the plaintiff.

Relying strongly on Syed Alwi's letter, the plaintiff was able to prove that his promise together with the defendant's promise constituted one single transaction and was causally related to one another (*Wingan v English and Scottish Law Life Insurance Association* [1909] 1 Ch 291). Taken in its correct perspective, the terms of the contract between the parties were not in dispute and for this reason, summary judgment under O 14 should issue against the defendant.

But the defendant did not give up hope. In a relentless attack, so to speak, the defendant made valiant attempts to show to this court that there was no oral contract between the parties. With respect, the defendant's submissions were advanced without taking into account the existence of Syed Alwi's letter. The defendant referred to the statement of claim and submitted that the plaintiff purported to provide:

(a) advisory service, and to render

(b) assistance by using

(c) his skill,

(d) knowledge, and

(e) endeavours,

by holding or having discussions as well as negotiations with both the government and non-governmental bodies, agencies and authorities in order to obtain the Petronas Carigali contract for the defendant. A question was posed as to what kind of advisory service the plaintiff provided in order to enable the defendant to secure the Petronas Carigali contract. The defendant then proceeded to pose the following questions:

(1) Is the plaintiff a qualified and trained petroleum engineer?

(2) Is the plaintiff a trained petro-chemical expert or an oil and gas expert or a professional who provides such technical petroleum advice?

and the defendant provided the answers in this way: that on the balance of probabilities the plaintiff cannot provide such advice because the defendant, being an oil and gas company, has under its wing employees who have these sort of expertise. With regard to the question of assistance, a question was posed pertaining to the nature of the assistance which the plaintiff was supposed to render and that question was worded as follows: was the plaintiff providing technical petroleum know-how assistance? And the defendant gave the same kind of answer and that was that the defendant was providing that kind of assistance through its employees. With regard to the skill which the plaintiff was supposed to have, the defendant posed this question: what sort of skill was the plaintiff planning to use? The defendant also framed the following germane question: what would be the knowledge and endeavours which the plaintiff proposed to use when he held or had discussions with the government and non-governmental bodies, agencies and/or authorities in order to enable the defendant to secure the Petronas

Carigali contract? The defendant proposed the answer in this way: that on the balance of probabilities the skill, knowledge and endeavours that the plaintiff alleged that he would use or had used cannot be technical petroleum skill, knowledge or endeavours because the defendant has employees who have such technical skill, knowledge and endeavours. That being the case, it was pointed out that the plaintiff must have the type and nature of advisory services, assistance, skill, knowledge and endeavours which the defendant or anyone for that matter did not have. In the same breath, the defendant posed these pertinent questions:

(1) Who is the plaintiff?

(2) What is his profession?

(3) What is his position and status in society such that he has got such skill, knowledge and endeavours which the defendant does not have?

(4) Whoever he may be or whatever position he holds in society he must certainly have a strong influence with the government and non-governmental bodies, agencies and/or authorities otherwise he would not be able to help the defendant to obtain the contract with Petronas Carigali, and this must be the nagging question that remains in the 'mind' of the defendant.

In rebuttal, it was pointed out that the plaintiff had expended his exertions in securing the Petronas Carigali contract for the defendant. It was emphasized that the plaintiff had obtained the assistance of the treasury by marketing the defendant in order to successfully bid for the Petronas Carigali contract. Syed Alwi had confirmed by letter that the marketing works or the marketing services rendered by the plaintiff had enabled the defendant to secure the Petronas Carigali contract. Marketing services were said to be services that include selling the defendant's company of its ability to do the work and the kind of expertise that the defendant was said to have. Flowing from these submissions, it was emphasized, with vigour and vitality, that in order to do such marketing one need not have to be a trained petroleum engineer or an oil and gas expert or a trained chemical engineer. Indeed that was a sound submission. The issue of the day for this court to decide which would ultimately dispose of both encll 19 and 20 would be this chilling question: whether the Petronas Carigali contract was awarded to the defendant? The answer would certainly be in the positive and the defendant did not dispute this fact at all.

It was part and parcel of my judgment that the plaintiff had rendered his services to the defendant by securing that Petronas Carigali contract and this was amply confirmed by way of corroboration in the letter emanating from Syed Alwi.

With regard to the submissions that, firstly, the contract between the parties were illegal and, secondly, such contract was against public policy, it must be highlighted that such allegations were not particularized nor proved by the defendant. In any event, these submissions had been considered by me and they were totally devoid of merit.

It was submitted that the plaintiff did not produce evidence of minutes, correspondences or other documentation which proved that the plaintiff

had discussed the matter of the Petronas Carigali contract with governmental and non-governmental bodies, agencies and/or authorities to enable the defendant to procure the contract. It was submitted that the plaintiff was merely hiding behind the facade of Syed Alwi's letter to advance his cause of action. It was the stand of the defendant and it was reiterated time and again that the contract between the parties was tainted with illegality. But I have ruled in the earlier part of this judgment, that the contract was perfectly within the domain of the Contracts Act 1950 and I do not propose to add anything more. As I see it, the defendant was grasping at straws. The defendant relied on the case of *Seidler v Schallhofer* [1982] 2 NSWLR 80 as well as the case of *Fender v St John-Mildmay* [1938] AC 1 — the former case considered the latter case, but these two cases are poles apart from the present case. In *Seidler*, the parties were unmarried and they entered into an agreement which provided that the parties were to continue to cohabit for six months and thereafter either marry or separate and, in the latter event, the plaintiff was to get a refund of her payments towards the purchase of the house in return for the transfer to the defendant of her half-share as joint tenant in the house and the court held that the agreement was not void as being against public policy. In *Fender*, a promise made by one spouse, after a decree nisi for the dissolution of the marriage had been pronounced, to marry a third person after the decree had been made absolute was held not void as being against public policy, and an action for damages for breaking of the promise was maintainable by the third person.

By narrating the brief facts of *Seidler* and *Fender*, I have shown that these two authorities have no bearing at all to the facts of the present case.

Not to be outwitted, the defendant relied on the case of *Montefiore v Menday Motor Components Company Ltd* [1918] 2 KB 241. That was an interesting case. The case of *Montefiore* laid down the following principles of law (see the headnote):

> It is contrary to public policy that a person should be hired for money or valuable consideration to use his position and influence to procure a benefit from the Government, and a contract for that purpose is therefore illegal and void.
>
> Where it appears from the evidence during the hearing of a case that the contract sued on is contrary to public policy it is the duty of the judge to take the objection that the contract is illegal and void.

and the facts may be gleaned from p 241 to p 242 of the report and I may be forgiven for reproducing those facts here:

> On 5 July 1917, a Mr Keeling, the managing director of the defendant company, gave to the plaintiff a commission note in the following terms: 'In consideration of your finding me the necessary capital, I am prepared to pay you 10 per cent on the amount introduced either direct or indirect, and also to allot you forty shares in the Menday Motor Components Company Ltd.'
>
> The plaintiff, by his statement of claim and particulars, alleged that he had found capital, or alternatively introduced capital, for the defendant company by having arranged with the Treasury to provide the defendant company with

the sum of 2000 *l.*, and that that amount was paid to the defendants. The plaintiff alleged that he thereupon became entitled to be paid by the defendants a commission of 200 *l.* and to have the shares allotted to him by the defendants. The defendants paid to the plaintiff three sums amounting in all to 100 *l.*, and the plaintiff in this action claimed to recover 100 *l.* as further commission due to him under the contract, and a declaration that he was entitled to have allotted to him forty shares in the defendant company.

The defendants, by their defence, denied that the plaintiff had performed any services in respect of which any claim could be made against them, or that any capital was found or introduced as the result of anything done or said by the plaintiff. The defendants also counterclaimed for the return of the 100 *l.* paid by them to the plaintiff as money paid on a consideration which had failed or upon a fraudulent representation.

During the hearing of the case the point was raised by the judge whether the contract was not against public policy and therefore void.

Shearman J, at p 245 to p 246 of the report, while delivering the judgment of *Montefiore* had this to say:

A contract may be against public policy either from the nature of the acts to be performed or from the nature of the consideration. In my judgment it is contrary to public policy that a person should be hired for money or valuable consideration when he has access to persons of influence to use his position and interest to procure a benefit from the Government. This was expressly decided by Lord Eldon in *Norman v Cole* (1800) 3 Esp 253 when he said: 'I cannot suffer this cause to proceed. I am of opinion this action is not maintainable; where a person interposes his interest and good offices to procure a pardon, it ought to be done gratuitously, and not for money: the doing an act of that description should proceed from pure motives, not from pecuniary ones.' So long ago as the reign of Edward VI, it was provided by the statute of 5 & 6 Edw 6, c 16, that it was illegal to bargain for any brokerage or money for the transference of an office, or any part of an office, concerning the receipt, controlment, or payment of any money or revenue of the Crown. And a later statute, 49 Geo 3, c 126, made it a misdemeanour to receive money for any office, place, or employment particularly specified in that Act. While I do not go the length of holding that the defendants were bargaining with the plaintiff that they should receive an office under the Crown, I agree with the remarks of Coltman J in the case *Hopkins v Prescott* (1847) 4 CB 578, 596 that where a person undertakes for money to use his influence with the Commissioners of Taxes to procure for another party the right to sell stamps, &c, if the contract were not void by statute, it would be void at common law as contrary to public policy. It is well settled that in judging this question one has to look at the tendency of the acts contemplated by the contract to see whether they tend to be injurious to the public interest. In my judgment a contract of the kind has a most pernicious tendency. At a time when public money is being advanced to private firms for objects of national safety it would tend to corrupt the public service and to bring into existence a class of persons somewhat like those who in ancient times of corrupt politics were described as 'carryers,' men who undertook for money to get titles and honours for those who agreed to pay them for their influence: see the remarks of Lord St Leonards in *Egerton v EarlBrownlow* (1853) 4 HLC 1, 234.

It has been urged upon me in the course of the argument that a judge must act with great caution in declaring a contract void as against public

> policy. Burrough J in *Richardson v Mellish* (1824) 2 Bing 229, 252, said that public policy 'is a very unruly horse, and when once you get astride it you never know where it will carry you'; and Lord Bramwell in *Mogul Steamship Co v McGregor, Gow & Co* [1892] AC 25, 45 and Lord Halsbury in *Janson v Driefontein Consolidated Mines Ltd* [1902] AC 484, 491 repeat the warning. But, applying the words of Pollock CB in *Egerton v Earl Brownlow* 4 HLC 149, I think I am bound to look for the principles of former decisions, and not to shrink from applying them with firmness and caution to any new and extraordinary case that may arise.
>
> In my judgment it is both in accordance with precedent and with public interest that I should declare this contract void as against public policy, with the result that both the action and the counterclaim are dismissed with costs.

and using these passages, I was urged to rule that the contract between the parties in the present case is void since it was against public policy. It was pointed out that the Court of Appeal in *Wong Hon Leong David v Noorazman bin Adam* did not consider the case of *Montefiore* in its judgment. Perhaps the case of *Montefiore* was not cited before the Court of Appeal in *Wong Hon Leong David v Noorazman bin Adam.*

It must be emphasized that the case of *Montefiore* was decided in May 1918 while the case of *Wong Hon Leong David v Noorazman bin Adam* was decided in September 1995 against the background of our Contracts Act 1950 particularly ss 2(d) and 2(e) thereto.

It was apparent that the defendant relied on the case of *Montefiore* to argue that it was illegal to use one's position or influence to procure a benefit or to secure a contract. But, with respect, there was not an iota of evidence to show that the plaintiff in the present case had used his position of influence in securing the Petronas Carigali contract for the defendant. No doubt the respondent plaintiff in the case of *Wong Hon Leong David v Noorazman bin Adam* had used his influence with the Menteri Besar to secure the approval for the sub-division of the land, but this fact was brought to the attention of the court in that case. Indeed, the Court of Appeal speaking through Gopal Sri Ram JCA had alluded to this fact and his Lordship had employed the rigours of our Contracts Act 1950 to rule that the contract was good in law and his Lordship too had ruled that the contract was not illegal. I too, must follow the trail blazed by Gopal Sri Ram JCA in that case and all the more reason for me to give effect to the contract between the parties in the present case because there was no evidence at all to show that the plaintiff in the present case had used his influence to secure the Petronas Carigali contract for the defendant. At any rate, in deciding the case of *Wong Hon Leong David v Noorazman bin Adam*, the Court of Appeal was not bound to follow the decision of Shearman J in the case of *Montefiore.* I too am not bound to follow the decision in *Montefiore.* I am bound, however, to follow the decision of the Court of Appeal in *Wong Hon Leong David v Noorazman bin Adam.* This was my judgment and I so hold accordingly.

Going on an uphill task, it was argued that the plaintiff failed to give the detailed particulars of the contract and such failure was said to be fatal. Now, in the context of the present case, the contract in question would be

the one that was alluded to earlier and which bore the number PCSB 2100 21R and the contract number was alluded to and referred on several occasions by the defendant through the affidavits of Wan Ahmad without even bothering to question the details of the contract. The failure of the defendant to question the details of the contract in its affidavits must be held adversely against the defendant. Such lackadaisical attitude must be deplored. It was too late in the day for the defendant to question the details of the contract by way of oral submissions. Moreover, there was no denial in any of the defendant's affidavits that the defendant had in fact secured the Petronas Carigali contract.

It was wrong to submit that the parties to the contract was unclear because the statement of claim had identified the parties clearly and distinctly as the plaintiff on the one hand and the defendant on the other. It was also wrong for the defendant to question the mode of payment of the RM700,000 to the two companies because this was the mode as agreed to by both parties. It was also wrong for the defendant to submit that Syed Alwi's letter was hearsay. It was also wrong to say that the plaintiff was relying on hearsay evidence by referring to Syed Alwi's letter. Hearsay evidence is any evidence which is not a direct evidence. Here, it cannot be denied that Syed Alwi's letter is a piece of direct evidence. This was not the case where the damning letter was not written by Syed Alwi and that he had no personal knowledge of the recorded facts in that letter. In fact, in that letter Syed Alwi confirmed that he knew what went on. Syed Alwi employed words like: 'I would like to affirm that as agreed earlier ...', '... we would endeavour to pay you for your marketing services ....' in that very letter. I must say that in the context of the present case, Syed Alwi's letter was the best evidence as it came from a person in authority within the defendant's company. In short, the letter signed by Syed Alwi in his capacity as the executive director of the defendant's company was in fact a letter emanating from the defendant itself and hence it was wrong to argue that this letter was hearsay. To all intents and purposes, Syed Alwi's letter was issued by the defendant itself and it was not a piece of hearsay evidence. This was not a case where the plaintiff averred that the defendant had confirmed the oral contract between the defendant and the plaintiff by way of a letter but the plaintiff failed to produce that letter. This was a case where that letter of confirmation emanating from the defendant through its authorized agent in the person of Syed Alwi who held the post of an executive director was exhibited as part and parcel of the plaintiff's case for summary judgment. It is a correct statement of the law to say and I so say that the purpose of an O 14 application is to enable the plaintiff to obtain a quick judgment where there is plainly no defence to the claim. An O 14 application is not intended to shut out the defendant who could show that there is a triable issue. It was submitted that the defendant had shown numerous issues to prevent the O 14 application from being successful but, with respect, all the issues highlighted by the defendant were not triable at all. The defendant too failed to show 'that there ought for some other reason to be a trial' of the plaintiff's claim (see O 14 r 3(1) of the RHC; and *Miles v Bull* [1969] 1 QB 258; [1968] 3 All ER 632). These were my judgments and I so hold accordingly.

A At the end of the day, in order to show whether a binding contract exists, one must ascertain it by looking at the facts as presented by the parties thereto. Each case would be dependent on its own set of facts (see *Lau Sieng Nguong v Hap Shing Co Ltd*; *Lau Brothers & Co v China Pacific Navigation Co Ltd*; *Keppel Shipyard (Pte) Ltd v Monvia Motorship Corporation*; *Quek Choon Huat v RM Scow & Anor*; and *Ng Brothers* B *Construction v Kaolin (Malaysia) Sdn Bhd*). And from the facts of the present case, on the balance of probabilities, there was in existence a valid and binding contract between the parties thereto.

In the course of a very lengthy and time consuming submission, my attention was drawn to a notice of demand issued under s 218 of the C Companies Act 1965 by the plaintiff to the defendant in order to wind up the defendant. That notice of demand had been served on the defendant and the latter had applied by way of an ex parte application vide No D2–22–721–2001 to injunct the plaintiff from filing the petition for a winding up and the D2 Court had granted the application on an ex parte basis. I took note of these salient developments.

D Midway through the submission, Mr S Maniarasan appeared for the defendant and he submitted at great length. Nothing new surfaced from his submission. Nevertheless, I considered his submission anxiously while preparing this judgment. Nothing turned on his submission.

E *Conclusion*

For the reasons adumbrated above, I dismissed the defendant's appeal in encl 19 with costs. I too, without hesitation, dismissed the defendant's appeal in encl 20 with costs.

Defendant's appeal dismissed.

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Reported by Lim Lee Na

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